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In the Supreme Court of the United States.

OCTOBER TERM, 1977.

No. 77-1295

EDWARD F. BURKE,
PETITIONER,

v.

THE NARRAGANSETT ELECTRIC COMPANY,
RESPONDENT.

Petition for a Writ of Certiorari to the Supreme Court of Rhode Island.

JULIUS C. MICHAELSON,
Attorney General,
250 Benefit Street,
Providence, Rhode Island 02903.
R. DANIEL PRENTISS,
Special Assistant Attorney General,
56 Pine Street,
Providence, Rhode Island 02903.

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS.

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OCTOBER TERM, 1977.

No. .

EDWARD F. BURKE,
PETITIONER,

v.

THE NARRAGANSETT ELECTRIC COMPANY,
RESPONDENT.

Petition for a Writ of Certiorari to the Supreme Court of Rhode Island.

The Attorney General of Rhode Island, on behalf of the Administrator of the Rhode Island Division of Public Utilities and Carriers, petitions for a writ of certiorari to review the judgment of the Rhode Island Supreme Court entered in this case December 30, 1977.

Opinions Below.

The opinion of the Rhode Island Supreme Court, not yet reported, is printed in Appendix A, pp. 1a-12a. The decision and order of the Public Utilities Commission of the State of Rhode Island, reported at 17 PUR 4th 164 (1976), is printed in Appendix B, pp. 13a-33a.

Jurisdiction.

The judgment of the Supreme Court of the State of Rhode Island was entered on December 30, 1977. The Rhode Island Supreme Court is the highest court of the State. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

Question Presented.

Whether a state regulatory commission, in the course of setting intrastate retail rates of a jurisdictional public utility, may inquire into the reasonableness of the expenses incurred by that utility in the purchase, in interstate commerce, of electric power from an affiliated wholesale supplier of electricity, when those expenses are calculated under a rate allowed, but not adjudicated by the Federal Power Commission (Federal Energy Regulatory Commission).

Statutes and Constitutional Provisions Involved.

The Supremacy Clause (Article VI, cl. 2) of the United States Constitution; §§ 201, 205 of the Federal Power Act,

16 U.S.C. §§ 824, 824d; Rhode Island General Laws, §§ 39-3-24 through 30, 32 (printed in Appendix D, pp. 48a-56a).

Statement of the Case.

Edward F. Burke is Administrator of the Rhode Island Division of Public Utilities and Carriers ("Division"). The Division is the representative of the public interest in matters coming before the Rhode Island Public Utilities Commission ("P.U.C.") and is the respondent in review proceedings initiated with respect to P.U.C. orders. *See Narragansett Electric Co.* v. *Harsch*, ____ R.I. ____, 368 A. 2d 1194, 1200-1201 (1977).

The Narragansett Electric Company ("Narragansett") is a retail distribution electric utility, incorporated and doing business in the State of Rhode Island. The rates at which it sells electricity are subject to the jurisdiction of the P.U.C. General Laws of Rhode Island, 1956 Reenactment, Title 39, Chapters 1, 3. Narragansett is a wholly owned subsidiary of the New England Electric System ("NEES"), a public utility holding company incorporated in Massachusetts. Narragansett purchases all of its electricity for resale from the New England Power Company ("NEPCO"), a Massachusetts corporation also wholly owned by NEES.[1] NEPCO is a wholesale, interstate supplier of electricity whose rates are subject to the jurisdiction of the Federal Energy Regulatory Commission.[2] Federal Power Act, §§ 201 *et seq.*, 16 U.S.C. §§ 824 *et seq.*

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[1] NEPCO sells to two other affiliated retail companies, in Massachusetts and New Hampshire.

[2] On October 1, 1977, the Federal Energy Regulatory Commission succeeded to the functions and duties of the Federal Power Commission

On November 28, 1975, NEPCO filed a new, increased rate (designated the "R-10" rate) with the Commission, requesting that it be allowed to become effective on January 1, 1976. Of the total annual revenue increase to be effected by NEPCO's R-10 rate, approximately $40 million,[3] Narragansett's purchases would contribute approximately $9.3 million. On December 1, 1975, Narragansett filed with the P.U.C. a schedule of rates which were designed to collect $9.3 million in additional annual revenue from its retail customers. Narragansett requested that its filed rates be allowed to become effective either on January 1, 1976, or at such date as the Commission allowed NEPCO's R-10 rate to become effective. Narragansett cited as the sole reason for its request the increased expense for purchased power it anticipated under the R-10 rate. On December 30, 1975, the P.U.C. suspended the taking effect of Narragansett's filed rates, pursuant to § 39-3-11 of the General Laws of Rhode Island. The rate filing was given the P.U.C. Docket No. 1205. On December 31, 1975, the Commission suspended the effectiveness of NEPCO's R-10 rate for two months, allowing it to become effective on March 1, 1976, under bond, and subject to refund. In its order (Appendix C, pp. 34a-47a) the Commission noted of the cost of service underlying the R-10 rate that ". . . several issues may require development in an evidentiary

under the Federal Power Act (Department of Energy Organization Act, 91 Stat. 565 (1977), 42 U.S.C. § 7172). References to "the Commission" in this petition are to both agencies.

[3] The R-10 rate as filed represented a $28.5 million annual increase in revenues over those collected at the then-effective R-9 rate. The R-9 proceedings before the Commission subsequently resulted in disposition at a rate level representing approximately one-half the originally proposed R-9 increase. This, in effect, changed the effect of the R-10 rate increase to a $40 million revenue increase.

hearing. Moreover, the proposed increases in rates have not been shown to be just and reasonable and may be unjust, unreasonable or otherwise unlawful" (*id.*, at p. 44a).

The P.U.C. began hearings in Docket No. 1205 in March, 1976. The P.U.C. raised, of its own motion, questions as to its jurisdiction, authority and responsibilities with respect to Narragansett's rate filing at that, and subsequent, hearings. Specifically, the parties were asked whether §§ 39-3-27 through 39-3-32 of the General Laws of Rhode Island applied to Narragansett's filing. Those sections (reproduced in Appendix D, pp. 52a-56a) empower the P.U.C.[4] to investigate the reasonableness of payments made by a public utility to an affiliated company, and, upon a finding of unreasonableness, to disallow the payments or any part thereof which is found unreasonable from the utility's cost of service in the setting of rates.

Narragansett took the position at the hearing and in memoranda subsequently filed that the P.U.C. could not investigate the reasonableness of the costs underlying Narragansett's payments to NEPCO. Narragansett contended that for the P.U.C. to do so would constitute an impermissible burden on interstate commerce, in violation of Article I, § 8, of the United States Constitution. Narragansett further argued that the P.U.C. was pre-empted from investigation of wholesale costs by the Federal Power Act, claiming that the United States Congress placed exclusive jurisdiction over wholesale rates for interstate sales of electricity in the Commission. Narragansett therefore moved for immediate implementation of its requested rates.

[4] These sections, which speak in terms of the Division, antedate a 1969 reorganization of the Division and establishment of the P.U.C. Under § 39-1-37 of the General Laws, these references to the Division are to be read as referring to the Commission (P.U.C.).

The P.U.C. rejected Narragansett's arguments, ruling that its investigatory and rate-making powers under § 39-3-30 of the General Laws of Rhode Island were neither an unconstitutional burden on interstate commerce, nor pre-empted by the Federal Power Act.[5] The P.U.C. then proceeded to examine the nature of the costs for purchased power which Narragansett was seeking to include in its rates as a result of the R-10 rate being imposed upon it by its affiliate NEPCO. After extensive hearings the P.U.C. issued its decision and order in Docket No. 1205 on December 1, 1976. Therein the P.U.C. acknowledged that it was powerless to set the rate at which Narragansett paid NEPCO for purchased power. It determined, however, that in the absence of any Commission finding as to reasonableness, and with such finding but a dim prospect in the future, it did have jurisdiction to analyze the costs which made up NEPCO's rates in order to arrive at a just and reasonable level of purchased power expense to be reflected in Narragansett's retail rates. The P.U.C. found four specific elements of the cost of service included in purchased power expense to be unjust and

[5] The P.U.C.'s bench ruling on Narragansett's motion is as follows:

> "The members of the commission have completed their conference on the question of the motion presented by the company, and the determination of the commission is that the motion is denied. The commission has determined on the basis of the legal memoranda and the arguments as well that it has clear jurisdiction and authority as well as the obligation under Rhode Island statutes to investigate the costs which relate to and which underly the proposed purchased power cost adjustment. It is the commission's determination that this investigation relates to its jurisdiction over the intrastate rates of The Narragansett Electric Company and in no way does this investigation or the action of the commission in pursuing the investigation contravene the commerce clause of the United States Constitution or the relevant provisions of the Federal Power Act." (Transcript, August 17, 1976, p. 3.)

unsupported; it therefore allowed Narragansett to incorporate in its rates an expense for purchased power which did not comprehend the four items the P.U.C. found to be repugnant. Of the total requested increase in annual revenues of $9.3 million, Narragansett was granted $5.4 million.

Narragansett thereafter filed a petition for writ of certiorari with the Rhode Island Supreme Court, pursuant to § 39-5-1 of the General Laws of Rhode Island. On December 30, 1977, after briefing and argument, that court issued its opinion with respect to the P.U.C.'s decision and order in Docket No. 1205. *Narragansett Electric Co.* v. *Burke*, No. 76-442 M.P. Therein the Rhode Island Supreme Court determined that ". . . the PUC lacks jurisdiction to inquire into the reasonableness of NEPCO's wholesale rate to Narragansett because the Federal Power Act preempted the authority of state commissions to investigate interstate prices" (Appendix A, p. 4a). It was the court's determination that the P.U.C.'s application of its investigatory and rate-making powers under § 39-3-30 to Narragansett's purchases of electricity from its affiliate NEPCO was in violation of the Supremacy Clause of the United States Constitution, since Congress had vested exclusive jurisdiction over interstate, wholesale rates for electricity in the Commission.

On February 1, 1978, Edward F. Burke applied to the Rhode Island Supreme Court, pursuant to 28 U.S.C. § 2101(f), for a stay of execution of its decision of December 30, 1977. The court on February 3, 1978, granted the application.

Reasons for Granting the Writ.

I. THE DECISION BELOW ERRONEOUSLY CONSTRUES THE EFFECT OF THE FEDERAL POWER ACT ON STATE AUTHORITY TO REGULATE THE INTRASTATE RETAIL SALES OF PUBLIC UTILITIES, IN DIRECT CONFLICT WITH DECISIONS OF THIS COURT.

Part II of the Federal Power Act,[6] subjecting the transmission and wholesale of electric energy in interstate commerce to the jurisdiction of the Federal Power Commission, was enacted in 1935. The Natural Gas Act,[7] bringing into the Commission's jurisdiction the transmission and wholesale in interstate commerce of natural gas, was enacted in 1938. These Acts[8] came into being after development of a substantial series of decisions of this Court dealing with the scope of permissible state regulation of the rates for electric and gas utilities, where those utilities derived some or all of their product for resale from interstate commerce. The focus of the early litigation was definition of the perimeter of allowable state regulation in the context of the Commerce Clause. In one of the earliest decisions on the issue, this Court determined that state regulation of retail rates of a gas distribution utility, where that utility purchased its product from a wholesale, interstate pipeline, was far enough removed from interstate commerce so as not to constitute an impermissible burden upon it. *Public Utilities Commission*

[6] 16 U.S.C. §§ 824 *et seq.* (§§ 824, 824d are reprinted in Appendix D, pp. 48a-52a).

[7] 15 U.S.C. §§ 717 *et seq.*

[8] For all purposes material here, the jurisdictional aspects of the Federal Power and Natural Gas Acts are identical. *Federal Power Commission* v. *Southern California Edison Co.*, 376 U.S. 205 (1964); *Federal Power Commission* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956). The Acts will be referred to interchangeably hereinafter.

v. *Landon*, 249 U.S. 236 (1919). In *Pennsylvania Gas Co.* v. *Public Service Commission*, 252 U.S. 23 (1920), this Court upheld state regulation of retail rates for natural gas where the gas flowed directly from interstate commerce to the burner tip. A state could not, however, regulate the price at which natural gas, flowing from interstate commerce, was sold at wholesale to a local distribution utility. *Missouri ex rel. Barrett* v. *Kansas Natural Gas Co.*, 265 U.S. 298 (1924). Similarly, state regulation of the price at which a local utility sold electric energy at wholesale to an out-of-state distributing company was an unconstitutional burden on interstate commerce. *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927).

The state of the law after *Attleboro*, *supra*, was that regulation of rates at which a utility's service was sold to ultimate consumers was a matter of essentially local interest, and constituted at most an indirect burden on interstate commerce. Such regulation therefore was not in conflict with the Commerce Clause. If the regulation asserted is over wholesale rates, however, where the gas or electricity moves in interstate commerce, the burden is direct. Such regulation is ". . . essentially national in character. . . . [I]t can only be attained by the exercise of the power vested in Congress." *Attleboro*, *supra*, 273 U.S. at 90 (citations omitted).

A refinement of the question was presented in *Western Distributing Co.* v. *Public Service Commission*, 285 U.S. 119 (1932). There a Kansas retail gas distribution utility purchased its product for resale from an interstate gas pipeline company. Both distributor and supplier were subsidiaries of the same holding company. In a proceeding to determine a request of the retail company for an increase in its rates, the Kansas Commission undertook to examine the propriety of the wholesale rate the utility paid its interstate

supplier for gas purchased. This Court rejected the utility's argument that such an examination was an attempt to accomplish indirectly what states were forbidden in *Kansas Natural Gas Co., supra,* to do directly:

> "There is an absence of arm's length bargaining between the two corporate entities involved, and of all the elements which ordinarily go to fix market value. The opportunity exists for one member of the combination to charge the other an unreasonable rate for the gas furnished and thus to make such unfair charge in part the basis of the retail rate. The state authority whose powers are invoked to fix a reasonable rate is certainly entitled to be informed whether advantage has been taken of the situation to put an unreasonable burden upon the distributing company, and the mere fact that the charge is made for an interstate service does not constrain the Commission to desist from all inquiry as to its fairness. Any other rule would make possible the gravest injustice, and would tie the hands of the state authority in such fashion that it could not effectively regulate the intrastate service which unquestionably lies within its jurisdiction." *Western Distributing Co., supra,* 285 U.S. at 124-125.

In *Dayton Power & Light Co.* v. *Public Service Commission,* 292 U.S. 290 (1934), this Court upheld, on the basis of *Western Distributing,* the Ohio Commission's disallowance in a utility's retail rates of a portion of the total wholesale rate paid by the utility to its affiliated, interstate supplier. To a similar effect is *Lone Star Gas Co.* v. *Texas,* 304 U.S. 224 (1938). *Natural Gas Pipeline Co.* v. *Slattery,* 302 U.S. 300, 307 (1937), succinctly stated the law enunci-

ated in the line of decisions emanating from *Western Distributing*:

> "This Court has often recognized that the reasonableness of the price at which a public utility company buys the product which it sells is an appropriate subject of investigation *when the resale rates are under consideration,* and that any relationship between the buyer and seller which tends to prevent arm's length dealing may have an important bearing on the reasonableness of the selling price." (Citations omitted; emphasis supplied.)

It was into these contours of the law that Congress fitted the federal jurisdiction it created in the Federal Power Commission with the Federal Power and Natural Gas Acts: while states could not set the rates at which wholesales were made in interstate commerce, their jurisdiction over the retail rates of local utilities was plenary; this jurisdiction included the power to investigate the *reasonableness* of an interstate rate imposed by an affiliated wholesaler in the course of setting retail rates. The Acts indicate that they did not disturb the powers of the states as then existing; the Federal Power Act extended federal jurisdiction ". . . only to those matters which are not subject to regulation by the States." The Commission was given jurisdiction over ". . . the transmission of electric energy in interstate commerce and . . . the sale of electric energy at wholesale in interstate commerce . . ."; ". . . any other sale of electric energy . . .," as well as facilities used in intrastate commerce, were specifically exempted from the Commission's jurisdiction. Federal Power Act, §§ 201(a) and (b), 16 U.S.C. §§ 824(a) and (b). Section 1(b) of the Natural Gas Act, 15 U.S.C.

§ 717(b), similarly restricts Commission jurisdiction with respect to natural gas.

The strict limitation of federal regulation to only those areas in which the states, under decisions of this Court, were powerless to act was fully intended by Congress. For example, H.R. Rep. No. 1318, 74th Cong., 1st Sess. (1935), discussing the proposed Federal Power Act, states:

> "The bill takes no authority from State Commissions and contains provisions authorizing the Federal Commission to aid the State Commissions in their efforts to ascertain and fix reasonable charges. . . . *The new parts are so drawn as to be a complement to and in no sense a usurpation of State regulatory authority*. . . ." (Emphasis supplied.) *Id.* at pp. 7-8.
>
> . . . . . .
>
> "As in the Senate bill no jurisdiction is given over local distribution of electric energy, *and the authority of states to fix local rates is not disturbed even in those cases where the energy is brought in from another state.*" (Emphasis supplied.) *Id.* at p. 27.

Similarly, S. Rep. No. 621, 74th Cong., 1st Sess. (1935), declared:

> "This subsection [Federal Power Act, § 1(b)] leaves to the states the authority to fix local rates even in cases where the energy is brought in from another State. In [*Pennsylvania Gas Co., supra*, 252 U.S. 23] the Supreme Court held that such rates could be regulated by the States in the absence of Federal legislation. The present bill carefully refrains from asserting Federal

> jurisdiction over these rates. *The rate-making powers of the Commission are confined to those wholesale transactions which the Supreme Court held in [Attleboro, supra, 273 U.S. 83] to be beyond the reach of the States.*" (Emphasis supplied.) *Id.* at p. 48.

The legislative history of the Natural Gas Act evidences the same, clear Congressional intent: restriction of federal jurisdiction to only those areas where the states could not constitutionally act. *See* H.R. Rep. No. 709, Committee on Interstate and Foreign Commerce, 75th Cong., 1st Sess. (1937).

This Court has had numerous occasions to pass on the question of the extent of the field occupied by Congress in passing the Acts.

> "It is clear that the mischief to be remedied [by the Federal Power Act] was the incompetence of the states to regulate rates for the sale by the producer of electricity at wholesale to be transmitted and delivered to an extrastate utility at or across a state line. This was the problem and the only problem which confronted the Congress. . . . Congress did not go beyond the needs of the situation." *Jersey Central Power & Light Co.* v. *Federal Power Commission*, 319 U.S. 61, 80-81 (1943) (Roberts, J., dissenting).

The line between permissible state regulation and federal regulation was not defined by Congress; Congress only filled the void of impermissible state regulation already defined by this Court.

"The line of . . . [the Natural Gas Act] was thus clear and complete. It cut sharply and cleanly between sales for resale and direct sales for consumptive uses. No exceptions were made in either category for particular uses, quantities or otherwise. *And the line drawn was that one at which the decisions had arrived in distributing regulatory power before the Act was passed.*" *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission*, 332 U.S. 507, 517 (1947) (footnote omitted) (emphasis supplied).

See Federal Power Commission v. *Louisiana Power & Light Co.*, 406 U.S. 621, 639-641 (1972); *Federal Power Commission* v. *Southern California Edison Co.*, 376 U.S. 205, 211-216 (1964); *Federal Power Commission* v. *East Ohio Gas Co.*, 338 U.S. 464, 472 (1950).

Congress in passing the Acts did not deprive the states of any authority they previously could exercise. It established federal regulation in the areas which this Court had held the states could not reach. A state's investigation of the costs underlying the wholesale, interstate rate an in-state utility pays to its affiliated supplier, when the purpose of the inquiry is to set the intrastate, retail rates, clearly was, prior to the Acts, a valid and appropriate exercise of its authority. *Western Distributing Co., supra*. The state's plenary jurisdiction over retail rates was expressly reserved in them by the Acts. The decision below, however, held that the P.U.C.'s investigation of NEPCO's costs in order to set Narragansett's retail rates was pre-empted by the Federal Power Act.

The question whether pre-emption exists is not susceptible of any universal or formulaic answer. Pre-emption must be determined on a case-by-case basis, having regard for two

countervailing mandates of the United States Constitution: Article VI, cl. 2 (the Supremacy Clause), and the Tenth Amendment. *Northern States Power Co.* v. *Minnesota*, 447 F. 2d 1143 (8th Cir. 1971), *aff'd*, 405 U.S. 1035 (1972). There is a variety of circumstances in which pre-emption has been found to occur. Where Congress has expressly declared federal regulation of a subject to be exclusive, pre-emption is clear. *Campbell* v. *Hussey*, 368 U.S. 297 (1961). Where there is an absence of express language as to exclusivity, pre-emption may nevertheless be inferred from legislative history. *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218 (1947). Finally, pre-emption may occur where there is an actual conflict between state and federal regulation, where compliance with the one would of necessity create non-compliance with the other. *Case* v. *Bowles*, 327 U.S. 92 (1946).

Since the Federal Power Act expressly declares that it does *not* pre-empt state authority to regulate intrastate, retail rates, since investigations such as that conducted by the P.U.C. below were held to be clearly within the state's constitutional reach prior to the Act, and since the legislative history of the Acts and subsequent decisions of this Court firmly show that the Acts did not disturb previously existing state regulatory authority, pre-emption of the P.U.C.'s powers under § 39-3-30 of the Rhode Island General Laws, if it exists, can only arise from a determination that that statute ". . . stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941) (footnote omitted).

The purpose of the Federal Power Act is to protect the public from abusive practices of public utilities by bringing federal control to transactions in interstate commerce beyond the reach of the states. *Gulf States Utilities Co.* v. *Federal*

Power Commission, 411 U.S. 747 (1973), *reh. denied*, 412 U.S. 944 (1973). One aspect of such federal control is regulation of rates. The Commission investigates, hears, and determines the reasonableness of rate increase filings by jurisdictional public utilities. When it receives a filing for an increase in rates, the Commission may suspend the effectiveness of the filed rates for no more than five months; thereafter, the rate as filed becomes effective, subject to refund, pending completion of the hearing and decision process. Federal Power Act, § 205, 16 U.S.C. § 824d. This process is usually years in length.[9] Ultimately, the Commission finds and sets a reasonable rate and refunds are made.[10]

The P.U.C. determined to act in the interim between effectiveness of the filed wholesale rate and a Commission finding of a reasonable wholesale rate. It allowed to be reflected in Narragansett's retail rates that portion of the total wholesale price of power which represented a reasonable cost of purchased power determined in accordance with established regulatory principles. The ends of federal and state regulation here are identical: protection of the public from unreasonable charges by public utilities. State regulation complements without contradicting or impinging upon federal regulation. The state does not presume to set a wholesale, interstate rate; it uses its investigatory powers, in the absence and in anticipation of a Commission deter-

[9] In the Commission proceedings in *New England Power Co.*, Docket Nos. E-8641 *et al.*, a final order issued February 6, 1978 (Opinion No. 803-B). At issue were two rate increases filed by NEPCO in July, 1973, and January, 1974.

[10] This Court has recognized that the ultimate availability of a refund does not fully balance the current inequity of an unfairly high rate. *Federal Power Commission* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145, 154-155 (1962).

mination, to find a reasonable level of purchased power expense to reflect in the retail, intrastate rates which it alone has the power to regulate. Where state and federal regulation of the same general subject matter can co-exist in harmony, pre-emption should not be inferred. *De Canas* v. *Bica*, 424 U.S. 351 (1976).

Thus, the decision below, finding pre-emption, is in direct conflict with clear holdings of this Court as to the Federal Power Act's preservation in the states of previously existing state regulatory authority. This case presents a major question of federal-state relations in the regulation of public utilities, and should be reviewed and resolved by this Court.

II. The Question Presented has Never been Decided by this Court.

Western Distributing Co., *supra*, and subsequent cases have presented to this Court factual situations identical to the instant case in all respects save one: federal regulatory jurisdiction over the interstate, wholesale utility. *Public Utilities Commission* v. *United Fuel Gas Co.*, 317 U.S. 456 (1943), decided after passage of the Natural Gas Act, examined to a limited extent the Act's effect on state regulatory authority. The Court determined that, while the Natural Gas Act pre-empted whatever prior jurisdiction the states had over interstate transportation and sale of natural gas, it does not bar a state commission, ". . . in the appropriate exercise of its jurisdiction, from compelling the production of evidence relevant to the proceeding before it." *Id.* at 468. In the proceeding below the P.U.C., in the exercise of its jurisdiction over Narragansett's retail rates, compelled production of and examined evidence relative to the expenses imposed upon it by its affiliate NEPCO.

United Fuel Gas Co., supra, supports the P.U.C.'s authority so to inquire. This petition presents this Court with the opportunity unambiguously to declare the states' regulatory authority consistent with the Acts.

III. The Question Presented is of Major National Significance.

The Narragansett-NEPCO relationship is not unique among utilities in the United States. Of just the wholesale electric utilities subject to Commission jurisdiction, 18 sold power to 28 associated, total requirements customers in 1975.[11] Each wholesale transaction with an associated utility represents a situation where the same question as the one presented in this petition could come into controversy. The question therefore warrants review by this Court in order that it may finally be resolved.

[11] *Statistics of Privately Owned Electric Utilities in the United States,* Federal Power Commission, 1975, pp. 785-788. The 28 wholesale transactions with associated utilities were distributed as follows: Northeast, 14; East Central, 6; North Central, 7; West Central, 1.

Conclusion.

For all the above reasons, the petitioner prays that this Honorable Court grant a writ of certiorari to review the judgment of the Rhode Island Supreme Court, entered in these proceedings on the 30th day of December, 1977.

Respectfully submitted,

JULIUS C. MICHAELSON,
Attorney General,
250 Benefit Street,
Providence, Rhode Island 02903.
R. DANIEL PRENTISS,
Special Assistant Attorney General,
56 Pine Street,
Providence, Rhode Island 02903.

Appendix A.

SUPREME COURT OF RHODE ISLAND.

THE NARRAGANSETT ELECTRIC COMPANY

v. No. 76-442-M.P.

EDWARD F. BURKE ET AL.

Opinion.

BEVILACQUA, C.J. This case is before us on a petition for a writ of certiorari filed by The Narragansett Electric Company (Narragansett) pursuant to G.L. 1956 (1969 Reenactment) § 39-5-1 to review the December 1, 1976 decision and order of the Public Utilities Commission (PUC).

Narragansett, whose retail rates are regulated by PUC, is a retail distribution electric utility company serving approximately 250,000 customers in Rhode Island. It is a wholly owned subsidiary of the New England Electric System (NEES), a public utility holding company incorporated in Massachusetts and registered under the Public Utility Holding Company Act of 1935, 15 U.S.C. § 79 et seq (1970). Narragansett purchases electrical power from the New England Power Company (NEPCO), a Massachusetts corporation also wholly owned by NEES. Because NEPCO is an interstate wholesale supplier of electricity, its rates are subject to regulation by the Federal Power Commission (FPC) under the Federal Power Act. 16 U.S.C. § 824 et seq (1970).

In November 1975, NEPCO filed a rate increase request (designated Rate R-10) with the FPC. On December 1, 1975, Narragansett filed with the PUC a notice of price ad-

justment (Narragansett Rate PPCA No. 5) pursuant to the purchased power cost adjustment provisions (R.I. PUC No. 407) enacted by the PUC.[1] Narragansett requested that PUC allow increased rates, subject to possible refund, to cover the increased cost of obtaining power which resulted from the R-10 rate filed by NEPCO with the FPC. Both the NEPCO and Narragansett filings requested an effective date of January 1, 1976. On December 30, 1975, the PUC entered an order suspending the January 1976 effective date to permit investigation and a hearing. On December 31, 1975, the FPC issued an order which accepted the R-10 rate for filing, suspended it for 2 months, and allowed it to become effective, subject to refund and before investigation of its reasonableness, on March 1, 1976. The FPC order noted that "the proposed increases in rates have not been shown to be just and reasonable and may be unjust, unreasonable

[1]The Purchased Power Cost Adjustment provisions (R.I.P.U.C. No. 407) state in pertinent part:

> "The prices contained in the applicable rates of the Company are subject to adjustment for changes in the wholesale cost of purchased power. The cost of purchased power referred to herein is the Primary Service for Resale Rate of the New England Power Company as from time to time on file and effective with the Federal Power Commission, exclusive of any adjustment for cost of fuel applicable thereto.
>
> "1. The Purchased Power Cost Adjustment applicable to any change in the wholesale price of purchased power shall be an amount (computed to the nearest thousandth of a cent) equal to the ratio that the increase or decrease in the cost of purchased power bears to the sales by the Company, in the calendar year immediately preceding the effective date of the change in the supplier's Primary Service for Resale Rate.
>
> . . . . . .
>
> "3. The operation of this Purchased Power Cost Adjustment clause is subject to all powers of suspension, investigation and other regulatory authority of the Public Utilities Commission."

or otherwise unlawful." In a series of suspension orders, the PUC suspended Narragansett Rate PPCA No. 5 for the full 9-month statutory suspension period from the March 1, 1976 effective date of the R-10 rate.

During this 9-month period, the PUC conducted public hearings. Narragansett presented testimony and exhibits outlining the effect of NEPCO's R-10 rate on Narragansett's financial structure. Thereafter, the PUC requested legal memoranda from the parties on the issue of whether the PUC had the authority under § 39-3-30[2] to investigate the reasonableness of the R-10 contract rate. After considera-

[2]General Laws 1956 (1969 Reenactment) § 39-3-30 reads as follows:

> "Investigation and order as to transaction between affiliates. — The division shall have full power and authority to investigate any such contract, arrangement, purchase or sale, and if the division, after notice and hearing, shall find such contract, arrangement, purchase or sale to be unjust or unreasonable, the division may make such reasonable order relating thereto as the public good requires. In any such investigation the burden shall be on the public utility or affiliate to prove the reasonableness of any such contract, arrangement, purchase or sale with, from or to an affiliate. If the public utility shall fail to satisfy the division of the reasonableness of any such contract, arrangement, purchase or sale, the division may disapprove the same, or disallow payments thereunder or such part of any such payment as the division shall find to be unjust or unreasonable, or both disapprove and disallow as aforesaid. No payment disallowed by the division shall be capitalized or included as an operating cost of the public utility in the fixing of rates or as an asset in fixing a rate base. If, in any such investigation, the public utility or affiliate shall unreasonably refuse to comply with any request of the division for information with respect to relevant accounts and records, whether of such public utility or any affiliate, any portion of which may be applicable to any transaction under investigation, so that such parts thereof as the division may deem material may be made part of the record, such refusal shall justify the division in disapproving the transaction under investigation and disallowing payments in pursuance thereof."

tion, the PUC decided that it did have such authority, and hearings on this issue were held between August and November of 1976.

On December 1, 1976, the PUC issued its final decision and order. The PUC first acknowledged that it was without jurisdiction to set the rate at which NEPCO sells electric power to Narragansett. The PUC ruled that it could, nevertheless, investigate the reasonableness of the costs underlying the R-10 rate and could prevent Narragansett from passing through to its retail customers any portions of those costs which were "strikingly" or "glaringly" unreasonable.

The PUC considered four specific cost issues underlying NEPCO's R-10 rate: (1) NEPCO's cost of common equity (2) NEPCO's capital structure (3) NEPCO's cash working capital requirements, and (4) the proper rate-making treatment of losses incurred by NEPCO when it abandoned construction of a generating station. Based on its evaluation of the reasonableness of NEPCO's costs in these four areas, the PUC ruled that Narragansett should recover approximately $5,300,000 of the $9,300,000 annual increase in the cost of power occasioned by the R-10 rate. The PUC ordered Narragansett to effectuate rates reflecting the allowable amount for electricity consumed on or after December 1, 1976, such rates being subject to refund upon completion of FPC proceedings. The present petition for certiorari followed. Narragansett contends that the PUC lacks jurisdiction to inquire into the reasonableness of NEPCO's wholesale rate to Narragansett because the Federal Power Act preempted the authority of state commissions to investigate interstate prices. We agree.

I

The doctrine of preemption is based upon the supremacy clause. U.S. Const. art. VI. When Congress legislates in an area within the federal domain, it may, if it chooses, take for itself all regulatory authority over the subject, share the task with the states, or adopt as federal policy the state scheme of regulation. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146, 1152, 91 L. Ed. 1447, 1459 (1947). The question in each case is the intent of Congress. *Id.*

The Federal Power Act extended federal regulatory power to the "sale of electric energy at wholesale in interstate commerce . . .." 16 U.S.C. § 824(b) (1970). The Supreme Court has noted that the legislative history of the Federal Power Act evidences a "constant purpose to protect rather than to supervise authority of the states." *Connecticut Light & Power Co. v. FPC*, 324 U.S. 515, 525, 65 S. Ct. 749, 754, 89 L. Ed. 1150, 1158 (1945). However, the Court has determined that Congress, in enacting the Federal Power Act, intended to vest exclusive jurisdiction in the FPC to regulate interstate wholesale utility rates. *FPC v. Southern California Edison Co.*, 376 U.S. 205, 216, 84 S. Ct. 644, 651, 11 L. Ed.2d 638, 646 (1964).

> "What Congress did was to adopt the test developed in the *Attleboro* line which denied state power to regulate a sale 'at wholesale to local distributing companies' and allowed state regulation of a sale at "local retail rates to ultimate consumers." *Id.* at 214, 84 S. Ct. at 650-51, 11 L. Ed.2d at 646, *quoting Illinois Natural Gas Co. v. Central Illinois Pub. Serv. Co.*, 314 U.S. 498, 504, 62 S. Ct. 384, 386, 86 L. Ed. 371, 375 (1942).

The result is a blend of state-federal regulation, each with exclusive authority in its respective field. We conclude, therefore, that jurisdiction to determine the reasonableness of the wholesale rate charged by NEPCO to Narragansett rests exclusively with the FPC.

II

The PUC is the administrative agency charged with the duty of regulating the intrastate rates of public utilities within the State of Rhode Island. *Narragansett Elec. Co. v. Harsch*, ____ R.I. ____, ____, 368 A.2d 1194, 1199 (1977). Under § 39-3-11, the PUC is authorized to conduct hearings to investigate the propriety of proposed rate changes and to make such orders with regard to a proposed rate as may be just. In fixing just rates, the PUC must protect both the right of the public utility company and its investors to an opportunity to earn a return reasonably sufficient to maintain the utility's financial integrity, *Rhode Island Consumers' Council v. Smith*, 111 R.I. 271, 293, 302 A.2d 757, 770 (1973), and the consumer's right to pay a rate which accurately reflects the cost of service rendered plus a reasonable profit. *Narragansett Elec. Co. v. Harsch*, *supra* at ____, 368 A.2d at 1213.

Among the essential factual findings which the PUC must make in carrying out this duty is a determination of the operating expenses of the utility. *Rhode Island Consumers' Council v. Smith*, *supra* at 281, 302 A.2d at 764; 1 Priest, *Principles of Public Utility Regulation* 45 (1969). As the Court of Appeals for the District of Columbia stated in *Mississippi River Fuel Corp. v. FPC*, 163 F.2d 433, 437 (D.C. Cir. 1947):

> "Expenses (using that term in its broad sense to include not only operating expenses but depreciation and taxes)

> are facts. They are to be ascertained, not created, by the regulatory authorities. If properly incurred, they must be allowed as part of the composition of the rates. Otherwise, the so-called allowance of a return upon the investment, being an amount over and above expenses, would be a farce."

When the operating expense being investigated by the PUC is one incurred through a contract of the utility company with an affiliate, the burden is on the utility to establish the reasonableness of that expense. Section 39-3-30. If unpersuaded, the PUC may disallow all or part of the requested rate change.

However, the Supreme Court has said that a reasonable rate is that rate filed with or fixed by the FPC. *Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 251, 71 S. Ct. 692, 695, 95 L. Ed. 912, 919 (1951). "[N]ot even a court can authorize commerce in the commodity on other terms." *Id.* at 251, 71 S. Ct. at 695, 95 L. Ed. at 919 (1951). Thus the rate increase in the cost of electricity to Narragansett, filed and bonded by NEPCO, constitutes an actual operating expense and must be so viewed by the PUC. *See City of Chicago v. Illinois Commerce Comm'n*, 13 Ill. 2d 607, 616, 150 N.E. 2d 776, 781 (1958); *United Gas Corp. v. Mississippi Pub. Serv. Comm'n*, 240 Miss. 405, 442, 127 So.2d 404, 420 (1961); *Citizen Gas Users Ass'n v. Public Util. Comm'n*, 165 Ohio St. 536, 538, 138 N.E.2d 383, 384 (1956).

In a case presenting the precise issue which we now decide, the Mississippi Supreme Court reversed the state regulatory commission's disallowance of a portion of an interstate wholesale supplier's rate filed with the FPC and effective subject to bond for refund. The state commission had re-

fused to allow the FPC filed and bonded wholesale rates for natural gas as an operating expense to the local distributor of the gas on the ground that the rates were speculative and contingent because the FPC had not yet found them to be just and reasonable. The Mississippi court noted that the FPC had a backlog of several thousand filed and bonded rate increase requests which would take many years to hear and adjudicate. Nevertheless, the court held that, because the FPC has exclusive jurisdiction over interstate wholesale rates, the state commission was precluded from disallowing the filed rates as an operating expense. *United Gas Corp. v. Mississippi Pub. Serv. Comm'n, supra* at 443, 127 So.2d at 420. *Accord, City of Chicago v. Illinois Commerce Comm'n, supra* at 616, 150 N.E.2d at 781; *Citizen Gas Users Ass'n v. Public Util. Comm'n*, supra at 538, 138 N.E.2d at 384.

The Mississippi court also rejected the view adopted by the state commission that, because the interstate and intrastate companies were affiliates, the commission could disregard the FPC rates. The court noted that "[t]here is nothing to suggest that the FPC will not closely scrutinize this relationship, for the statutory purpose of protecting the public and consumers from exploitation." *United Gas Corp. v. Mississippi Pub. Serv. Comm'n, supra* at 442, 127 So. 2d at 420. *Accord, City of Chicago v. Illinois Commerce Comm'n, supra* at 615, 150 N.E.2d at 780.

We conclude, therefore, that for the purpose of fixing intrastate rates, the PUC must treat NEPCO's R-10 interstate rate filed with the FPC as a reasonable operating expense. Narragansett has met the burden of proof prescribed by § 39-3-30 by establishing that the price of the contract with its affiliate is the FPC filed and effective rate. However, because the FPC has not finally determined the interstate rate, the PUC has the power to require Narragansett to post

bond to reimburse the individual consumers for any increased costs which may be disallowed to NEPCO by the FPC. *See United Gas Corp. v. Mississippi Pub. Serv. Comm'n, supra* at 444, 127 So. 2d at 421.

The PUC, under the purchased power cost adjustment clause, may choose to adjust Narragansett's existing retail rates to reflect the changed cost of interstate power, but it need not do so. The Purchased Power Cost Adjustment Provisions specify that the operation of the clause is subject to "all powers of suspension, investigation and other regulatory authority" of the PUC. The commission, therefore, may treat the proposed rate increase as it treats other filings for charged rates under § 39-3-11 and investigate the overall financial structure of Narragansett to determine whether the company has experienced savings in other areas which might offset the increased price for power. The manner in which a fuel adjustment clause is treated is an administrative matter where there is broad latitude for the exercise of sound discretion. *Narragansett Elec. Co. v. Kennelly*, 88 R.I. 56, 85, 143 A.2d 709, 726 (1958). Therefore, we do not order the PUC to automatically adjust the retail rates in accordance with the purchased power cost adjustment clause. Rather, we remand the case to the PUC with the direction that no matter what method it adopts in considering Narragansett's proposed rate increase, it must treat the FPC filed and bonded purchase price to NEPCO as an actual operating expense.

III

Because we have decided that Narragansett's purchased power costs must be treated as an actual operating expense, we do not reach the constitutional issue of whether failure to treat it as such would constitute confiscation of Narra-

gansett's property in violation of the fourteenth amendment to the United States Constitution and article I, section XVI, of the Rhode Island Constitution.

There remains for our consideration Narragansett's contention that, because the PUC suspended the purchased power cost adjustment filing for 9 months after institution of the new rates by NEPCO, it is entitled to extraordinary retroactive relief. While conceding that retroactive relief is generally unavailable in rate cases, Narragansett points to our statement in *New England Tel. & Tel. Co. v. Public Util. Comm'n*, 116 R.I. 356, 358, A.2d 1 (1976), that "a rate schedule which represents a deprivation of due process either in its inability to provide a fair return or in the grossly excessive time it took to correct good faith errors of the commission in arriving at the new rates would certainly entitle the company to some sort of extraordinary relief." *Id.* at 392, 358 A.2d at 22.

Narragansett argues that there are two factors present which differentiate this case from the typical rate case in which extraordinary relief is unavailable: the PUC's lack of jurisdiction to inquire into the reasonableness of NEPCO's R-10 rate, and the failure of the PUC to rule on Narragansett's August 17, 1976 motion for extraordinary relief. Narragansett asserts that these factors evidence a "totally unreasonable" course of action by the PUC which deprived the company of due process and justifies extraordinary relief. We do not agree.

Although we hold today that the PUC had no authority to inquire into the reasonableness of NEPCO's R-10 rate, nothing in the record suggests that the commission approached this task with bad faith. The fact that the commission misjudged the effect to be accorded the R-10 rate filed with the FPC in no way supports the contention of

Narragansett that the commission's action in this regard was "totally unreasonable."

We also find that the PUC's failure to rule on the August 17 motion was not so arbitrary or unreasonable as to constitute a denial of due process. In its August 17 motion before the PUC, Narragansett requested that, in view of its "serious financial condition," it be allowed the full amount of its requested rate increase pending final resolution of the case. On September 3, 1976, Narragansett filed a petition for certiorari in this court pursuant to § 39-5-1[3] requesting similar relief. Section 39-5-2 requires that when a petition for certiorari is filed, the PUC must transmit the record of the case to this court. The PUC's compliance with this requirement necessarily interfered with its consideration of the case. On October 1, 1976, this court issued an order denying the requested relief. On December 1, 1976, after return of the record, the PUC issued its final order, thus rendering the August 17 motion for interim relief moot.

In view of the statutory requirement, we do not believe that the delay by the PUC in ruling on the motion was that type of "grossly excessive" delay which we have indicated

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[3] General Laws 1956 (1969 Reenactment) § 39-5-1 reads as follows:

"Judicial review. — Any person aggrieved by a decision or order of the commission may, within seven (7) days from the date of such decision or order, petition the supreme court for a writ of certiorari to review the legality and reasonableness of said decision or order. The petition for a writ of certiorari shall fully set forth the specific reasons for which it is claimed that the decision or order is unlawful or unreasonable. Chapter 35 of title 42 shall not be applicable to appeals from the commission. The procedure established by this chapter shall constitute the exclusive remedy for persons and companies aggrieved by any order or judgment of the commission; provided, however, any person aggrieved by a final decision or order of the administrator may appeal therefrom to the superior court pursuant to the provisions of § 42-35-15."

may entitle the utility company to retroactive relief. It is a fundamental rule that utility rates are exclusively prospective in nature. *See New England Tel. & Tel. Co. v. Public Util. Comm'n, supra* at 388, 358 A.2d at 20; *Rhode Island Consumers' Council v. Smith*, 111 R.I. 271, 292, 302 A.2d 757, 770 (1973). Additionally, there is a presumption that current commission orders are valid. Therefore, absent extraordinary circumstances, the utility company must bear the risk of loss inherent in the well-known lag accompanying the making of rate changes. *New England Tel. & Tel. Co. v. Public Util. Comm'n, supra* at 388-92, 358 A.2d at 20-22. We hold that Narragansett has not established that it is entitled to extraordinary retroactive relief.

The decision of the PUC is quashed in part. The records certified to this court are remanded to the PUC with instruction to the PUC to review the evidence and testimony in the present record as supplemented by such further testimony as may be offered by the parties or by the PUC's own direction. On the basis of this record so supplemented, the PUC is directed to make further findings and orders in harmony with this opinion.

Appendix B.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS PUBLIC UTILITIES COMMISSION

IN RE: TARIFF FILING MADE BY THE NARRAGANSETT ELECTRIC COMPANY ON DECEMBER 1, 1975 — Docket No. 1205

Decision and Order.

The Narragansett Electric Company ("Narragansett") filed with the Commission on December 1, 1975, a schedule of rates which was designed to match in increased revenues an increase it expected in the cost of the electric power it purchased for resale. Narragansett proposed that its rate filing become effective on January 1, 1976, or coincidentally with the increase in wholesale power costs which it sought to recover. The Commission suspended Narragansett's filing on December 30, 1975, pursuant to Section 39-3-11 of the General Laws of Rhode Island, pending investigation and hearings thereon.

The Narragansett Electric Company is a retail distribution electric utility, serving some 250,000 customers in Rhode Island. It is a wholly owned subsidiary of the New England Electric System ("NEES"), a public utility holding company incorporated in Massachusetts. Narragansett purchases all of its electricity for resale from the New England Power Company ("NEPCO"), a Massachusetts corporation also wholly owned by NEES. (NEES owns two other distribution companies as well, the Granite State Electric Company in New Hampshire, and Massachusetts Electric Company in Massachusetts.) NEPCO is a wholesale supplier of elec-

tricity, whose rates are subject to regulation by the Federal Power Commission ("FPC"). In November, 1975, NEPCO had filed a rate increase request (designated as Rate "R-10") with the Federal Power Commission, representing an increase in revenues of some $28.5 million over the level of its next prior request ("R-9"), filed one year earlier. One week thereafter, and as an appendage to that request, Narragansett made the instant filing with this Commission. This procedure reflects a pattern followed by the various arms of NEES for several years. NEPCO filed its R-9 rate, for example, in November, 1974. Narragansett followed with its own filing in December of the same year. The FPC accepted NEPCO's R-9 rate for filing, suspended it for five months and, without investigation or hearing, allowed it to become effective on June 1, 1975. In August, 1975, in response to motions by intervenors to the R-9 proceedings, the FPC ordered NEPCO to recalculate the R-9 rate without the inclusion of Construction Work in Progress ("C.W.I.P.") in rate base. The effect of this rejection of C.W.I.P. from NEPCO's rate base was to reduce the $25 million R-9 increase by approximately one half. There followed a series of machinations which can only be described as incredible. NEPCO claimed that, through several apparently innocuous filings, it had finessed the FPC's decision on C.W.I.P. Hence, it claimed, it was still entitled to the full $25 million R-9 increase. Narragansett countered by bringing the same witnesses who designed NEPCO's strategy to the Rhode Island Commission, to repeat their claim for the undiminished R-9 increase. In the meantime, NEPCO continued to collect the entire, filed R-9 rate. The FPC responded to entreaties for enforcement of its order rejecting C.W.I.P. from rate base, and reducing the R-9 rate accordingly, with silence. This Commission finally resolved the issue in its own jurisdiction by allowing Narragansett to pass through

to its customers an increase in purchased power cost based on the R-9 rate as modified by rejection of C.W.I.P. Ultimately, the R-9 proceedings were disposed of through settlement at approximately the same level as found by this Commission.

The FPC responded to NEPCO's November, 1975, filing with an order issued December 31, 1975, accepting the R-10 rate for filing, suspending it for two months, and allowing it to become effective, subject to refund, and without investigation as to its propriety or reasonableness, on March 1, 1976. The FPC allowed R-10's effectiveness, in spite of the recitation in its order that ". . . the proposed increases in rates have not been shown to be just and reasonable, and may be unjust, unreasonable or otherwise unlawful."

In view of the history of these companies' filings, and their substantial impact on the rates of Narragansett's customers (the cumulative effect of the Rhode Island share of NEPCO's rate increase filings since 1971 amount to more than $25 million in annual costs) the Commission felt constrained to do more than simply "rubber-stamp" the pass-through of cost increases imposed by one affiliate to another, cost increases which in the past have been proven to be at least in part unjustified. The Commission convened a hearing in this docket on March 23, 1976, to explore the status of this tariff filing within the framework of the various provisions of Title 39 of the General Laws of Rhode Island. Clearly, the instant filing was a filing made pursuant to Section 39-3-11 of the General Laws. Equally clear is that, under Section 39-3-12, Narragansett bore the burden of proving the reasonableness of the proposed rate increase. The Commission also called into consideration the applicability of Sections 39-3-27 through 39-3-32 of the General Laws, dealing with the regulatory treatment of transactions

between jurisdictional public utilities and companies with which they are affiliated. There was no dispute that NEPCO is an affiliate of Narragansett as defined by Section 39-3-27.[1] Nor was it seriously disputed that the R-10 rate is a contract, or contract amendment, within the meaning of Sections 39-3-27 through 39-3-32. The question presented was the applicability of Sections 39-3-30 and 39-3-32 to the instant tariff filing. Section 39-3-30 provides that the division[2] shall have full power to investigate contracts entered into between a jurisdictional utility and an affiliate, that the burden of showing the reasonableness and justness of any such contract is on the utility and its affiliate, and that no payment made pursuant to such a contract which is found by the division to be unreasonable may be included in the utility's cost of service in the fixing of its rates. Section 39-3-32 provides that, in any proceeding involving the rates of a public utility, unless the utility establishes the reasonableness of payments made to an affiliate, the inclusion of those payments in the utility's accounts may be disallowed. The Commission discussed, and solicited comments on, these statutes and their bearing on the tariff filing which is the subject of this docket, at the March 23, 1976, hearing. At its conclusion, the parties were requested to file memoranda of law setting forth their respective legal arguments on the question. These memoranda were duly filed.

It is Narragansett's contention that, in spite of the above-cited provisions of the General Laws, this Commission is

[1]Sections 39-3-27 through 39-3-32, inclusive, are set forth in their entirety in the appendix.

[2]Sections 39-3-27 through 39-3-32 of the General Laws antedate the 1969 revision of Title 39. By the terms of Section 39-1-3 and 39-1-37, references in Sections 39-3-27 through 39-3-32 to the "division" will be read as references to the "commission".

powerless to inquire into the reasonableness of the contractual terms under which it purchases power from NEPCO. Citing *Public Utilities Commission of Rhode Island v. Attleboro Steam and Electric Company*, 273 U.S. 83, 71 L.Ed. 549, (1927), and its progeny, Narragansett claims that state regulatory commissions have been excluded from the exercise of jurisdiction over the regulation of the rates at which electric power is sold at wholesale in interstate commerce. Narrangansett states first that *Attleboro, supra*, held that for state commissions to attempt to exercise such jurisdiction is to impose a direct burden on interstate commerce, in violation of the Commerce Clause of the United States Constitution. Secondly, Narragansett states that the passage of the Federal Power Act in 1935, establishing the Federal Power Commission, vested exclusive jurisdiction over wholesale sales of electricity in interstate commerce in the F.P.C., preempting the field from state control. Narragansett therefore concludes that, to the extent that Section 39-3-30, *et al.*, of the General Laws of Rhode Island may be construed as authorizing the investigation of NEPCO's wholesale rate in setting Narragansett's retail rates, those statutes, under the Supremacy Clause of the United States Constitution, must be unconstitutional.

The Rhode Island Consumers' Council ("Consumers' Council") argues that, while the Federal Power Commission has preempted the field of regulation of wholesale sales of electricity in interstate commerce, it did not displace all state regulation of the electric industry. Section 201 (b) of the Federal Power Act, 16 U.S.C.A. Sec. 824(b), for example, provides:

> The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in inter-

> state commerce, but shall not apply to any other sale of electric energy or deprive a State or State Commission of its lawful authority now exercised . . .. The Commission . . . shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in local distribution . . ..

The limit of federal regulatory power, the Consumers' Council states, is the setting of rates for wholesale prices of electricity in interstate commerce. Disposition of that electricity once it is withdrawn from interstate commerce, and jurisdiction to regulate all aspects of its disposition, is retained in the states. Support is found for this contention in *Federal Power Commission v. Southern California Edison Co.*, 376 U.S. 205, 11 L.Ed. 2d. 638, (1964) and *Connecticut Light and Power v. Federal Power Commission*, 324 U.S. 515, 89 L.Ed. 1150 (1945). To conclude that the Federal Power Act forbade state commission investigation of the reasonableness of the level of allowable intrastate pass-through for jurisdictional utilities of cost increases incurred via wholesale, interstate rates for purchased power, Consumers' Council states, would be to accept the Federal Power Commission as the regulator of intrastate, local rates. This is clearly contrary to the express language of the Act (Section 201 (b) *supra*).

There is room, Consumers' Council concludes, for concurrent state and federal regulation, so long as the state regulation does not disrupt or frustrate the federal agency's exercise of its Congressional mandate. Where there is such a frustration, preemption must be inferred. Where there is no overlap of federal and state regulatory concern, the state

and federal regulation may proceed in parallel. *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 4 L.Ed. 2d 852 (1960); *Marshall v. Consumers' Power Co.*, 237 N.W. 2d 266 (Mich. App. 1975). In the context of the instant docket, Consumers' Council states that the limit of the F.P.C.'s preemption is the setting of the wholesale, interstate rate of NEPCO. Such preemption, however, does not preclude this Commission's determination of the level of Narragansett's intrastate rate which will pass through to its customers only the reasonable costs of purchased power.

With the issues thus defined and joined, we see four basic questions which must be answered:

1) May this Commission set the rates at which NEPCO sells, and Narragansett purchases electricity?

2) Is this Commission's investigation of the contract, and the nature of the costs underlying that contract, by which Narragansett purchases electricity from NEPCO a burden on interstate commerce?

3) Is this Commission's investigation of the purchased power contract between NEPCO and Narragansett precluded by the Federal Power Act?

4) Is this Commission's disallowance of portions of Narragansett's payments to NEPCO under the R-10 contract from Narragansett's cost of service for the purpose of setting Narragansett's intrastate rates either a burden on interstate commerce, or precluded by the Federal Power Act?

After a thorough search of the applicable authorities, we have arrived at the following answers to these questions:

1) Unequivocally, this Commission is without jurisdiction to set the rate at which NEPCO sells electric power to Narragansett. *Public Utilities Commission v. Attleboro, supra*, firmly held that exercise of such jurisdiction by a state commission is a direct burden on interstate commerce. Passage of the Federal Power Act did nothing to amend this

holding; it merely created a federal agency to fill the regulatory void created by *Attleboro*. *Cf.*, *F.P.C. v. Southern California Edison, supra*; *F.P.C. v. East Ohio Gas Co.*, 338 U.S. 464, 94 L. Ed. 268 (1950); *Jersey Central Power and Light Co. v. F.P.C.*, 319 U.S. 68, 87 L. Ed. 1258 (1943). The setting of rates at which electricity is sold at wholesale in interstate commerce is under the exclusive dominion of the Federal Power Commission.

2) The investigatory powers of the Commission, enumerated in Section 39-1-13 and amplified by Section 39-1-38 of the General Laws, are broad. Those powers of investigation are not circumscribed by the limits of the Commission's regulatory jurisdiction. In *Interstate Commerce Commission v. Goodrich Transit Co.*, 224 U.S. 194, 56 L. Ed. 729 (1912), the Supreme Court stated, at 211, 736:

> "It is a mistake to suppose that the requiring of information concerning the business methods of such corporations, as shown in their accounts, is a regulation of business not within the jurisdiction of the Commission . . .. The object of requiring such accounts . . . is not to enable it to regulate the affairs of the corporations not within its jurisdiction, but to be informed concerning the business methods of the corporations subject to the act that it may properly regulate such matters as are really within its jurisdiction. Further, the requiring of information concerning a business is not regulation of that business."

See also, State ex rel. Railroad and Warehouse Commission v. Mees, 49 N.W. 2d 386, 235 Minn. 42 (1951).

The question of whether a state commission's investigations in the setting of jurisdictional rates impinged on the Commerce Clause of the United States Constitution, where the jurisdictional utility purchased its product for resale in interstate commerce, arose frequently between *Attleboro, supra*, and the passage of the Natural Gas Act in 1938. (In all aspects material here, the Natural Gas Act is identical to the Federal Power Act. The constitutional dividing line between permissible and impermissible state regulation is the same for natural gas and electricity. *See, F.P.C. v. So. Cal. Edison, supra,* at 211, 212; 644.) *Western Distributing Co. v. Public Service Commission,* 285 U.S. 119, 76 L. Ed. 655 (1932) involved the Kansas Public Service Commission's setting of intrastate rates of a Kansas gas distributing company. The distributing company and the interstate pipeline company from which it purchased natural gas were owned by the same firm. The authority of the Kansas commission to inquire into the reasonableness of the interstate rate at which Western Distributing paid its affiliated supplier for gas, in order to set Western's intrastate rates, was challenged on constitutional grounds. The Supreme Court held that, in view of the lack of arm's length bargaining between supplier and purchaser, such inquiry was permissible. *Accord, Petroleum Exploration, Inc. v. Public Service Commission*, 304 U.S. 209, 82 L. Ed. 1294 (1938); *Lone Star Gas Co. v. Texas*, 304 U.S. 224, 82 L.Ed. 1304 (1938). Thus, the constitutional line, drawn prior to commencement of federal regulation, clearly encompassed state investigation of the reasonableness of interstate rates. Neither the Federal Power Act nor the Natural Gas Act moved this line. Rather, those acts gave to the Federal Power Commission jurisdiction only over those areas the Supreme Court had previously held were constitutionally forbidden the states. *F.P.C. v. So. Cal. Edison, supra*; *F.P.C. v. East Ohio Gas Co.* 338 U.S. 464, 94 L.Ed. 268 (1950) (". . . *prior* constitutional decisions, not what we

have since decided or would decide today, form the measure of the gap which Congress intended to close by the (Natural Gas) Act." Black, J., at 472, 277 (emphasis in original)); *Panhandle Eastern Pipeline Co. v. Public Service Commission*, 332 U.S. 507, 92 L.Ed. 128 (1947).

We conclude, then, that this Commission is not constitutionally barred from investigation of the contract for purchase of electric power between Narragansett and NEPCO.

3) From the reasoning in *F.P.C. v. East Ohio Gas Co. supra*, and *Panhandle Eastern P.L. Co. v. P.S.C., supra*, it is clear that neither the Federal Power Act nor the Natural Gas Act altered the constitutional relationship of state commissions and interstate sales of electricity and gas. Neither did they statutorily preempt state commissions from the exercise of powers they previously held. The Federal Power Commission did not usurp any authority which the state commissions, prior to its establishment, could constitutionally wield. This is the conclusion reached by Congress in enacting the Federal Power Act. H.R. Report No. 1318, 74th Cong., 1st Sess., for example, states, at pp. 7, 8, 27:

> The bill takes no authority from State Commissions and contains provisions authorizing the Federal Commission to aid the State Commissions in their efforts to ascertain and fix reasonable charges . . .. The new parts are so drawn as to be a complement to and in no sense a usurpation of State regulatory authority and contain throughout directions to the Federal Power Commission to receive and consider the views of State Commissions. Probably, no bill in recent years has so recognized the responsibilities of State regulatory commissions as does Title II of this bill.
>
> . . . . . .

> Subsection (b) confers jurisdiction upon the Commission over the transmission of electric energy in interstate commerce and the sale of electric energy at wholesale in interstate commerce, but does not apply to any other sale of electric energy or deprive a State of any lawful authority now exercised over the exportation of hydroelectric energy transmitted out of the State. As in the Senate bill no jurisdiction is given over local distribution of electric energy, and the authority of states to fix local rates is not disturbed even in those cases where the energy is brought in from another State.

Where the state activity is directed toward legitimate exercise of its police power, i.e., the setting of intrastate rates for sale of electricity, preemption should not be inferred. *Cf. Huron Portland Cement v. Detroit, supra.* We conclude, therefore, that the Federal Power Act does not preclude our investigation of the contract between NEPCO and Narragansett.

4) The thorny question is the extent to which this Commission may use the fruits of its legitimate investigation of the NEPCO-Narragansett contract in setting Narragansett's rates. We are clearly without power to tell Narragansett what to pay, or NEPCO what to charge, for the electricity sold. *Northwestern Public Service Co. v. Montana-Dakota Utilities Co.*, 181 F.2d 19 (8th Cir. 1950) *aff'd*, 341 U.S. 246, 98 L.Ed. 912 (1951). Nor can we usurp the F.P.C.'s jurisdiction to decide on the reasonableness of the R-10 rate. On the other hand, we cannot blindly ignore the fact that the NEES operating companies have utilized and taken advantage of the F.P.C. procedures whereby filed tariffs become effective after short suspension periods, prior to investigation or hearings. The primary purpose of the

Federal Power Act and Natural Gas Act was to curb abusive practices of public utilities and bring them under effective control. *Gulf States Utilities Co. v. F.P.C.*, 411 U.S. 747, 36 L.Ed. 2d 1623 (1960). The Federal Power Commission was never envisioned as a foil by which utilities could effectively avoid regulation. "The Natural Gas Act created an articulate legislative program based on a clear recognition of the respective responsibilities of the federal and state regulatory agencies. It does not contemplate ineffective regulation at either level." *Panhandle Eastern P.L. Co. v. P.S.C.*, *supra*, at 520, 139. For us to continue to accept NEPCO's filed rates as being *prima facie* reasonable is to allow circumvention of regulation. The possibility that, several years hence, refunds will be awarded for that portion of any rate found to be unjust is an insubstantial offset to its collection today. *F.P.C. v. H.L. Hunt*, 376 U.S. 515, 11 L.Ed. 2d 878. For those who move from the area, or die, and for those businesses which fold, while awaiting F.P.C. action, the refund is indeed a will-o-the-wisp. *See, F.P.C. v. Tennessee Gas Transmission Co.*, 371 U.S. 145, at 154, 9 L.Ed. 2d 199, 206 (1962).

We are faced with a dilemma from which no easy extraction readily appears. We realize that in no way can our investigation approach in scope or thoroughness ultimate F.P.C. inquiry into the R-10 rate. We cannot second guess the F.P.C. on principles of regulation that it alone can apply. We cannot determine, for example, the propriety of NEPCO's rate structure amendments. But what we can, and must, do, to serve the public interest the General Assembly has directed us to protect, is examine the contract, to find if there are contained therein provisions which are so strikingly, glaringly unreasonable as to warrant a reduction in the amount Narragansett seeks to pass through to its customers. This is not the setting of the wholesale rate; our

activities in this docket are directed toward the single goal of establishing a just and reasonable intrastate rate for Narragansett. In order to determine that rate, it is necessary for us, in the absence of quick FPC action, to examine Narragansett's payments to its affiliate, and reject those portions of the payments which we find to represent unreasonable expenses. To this end, the Commission entered into hearings on the reasonableness of the elements inherent in the price of electricity at the R-10 rate on August 17, 1976. Narragansett produced the witnesses responsible for preparation of the cost of service inherent in the R-10 rate under protest, disputing this Commission's jurisdiction to make any inquiry into the wholesale contract. The Commission persevered, and undertook cross-examination of those witnesses. Their exhibits were entered into evidence. The Division of Public Utilities and Carriers ("Division") retained the services of two consultants, who presented independent analyses of the reasonable level of purchased power costs Narragansett should be allowed to pass on to its customers. These analyses presented four issues for this Commission's consideration in determining what portion, if any, of Narragansett's R-10 payments to NEPCO are so unreasonable that they should not be incorporated in Narragansett's intrastate rates. These issues are as follows:

1. The return on NEPCO's common equity to which Narragansett's customers reasonably should contribute.
2. The capital structure which should be utilized in calculating the overall return on NEPCO's rate base which Narragansett's customers should be required to support through their rates.
3. Whether Narragansett's customers should support through their rates an alleged double counting in

NEPCO's cash working capital allowance for expenditures for fuel used in generation.

4. Whether Narragansett's customers should have included in their rates payments made by Narragansett to NEPCO which reflect a total customer absorption of the loss due to NEPCO's abandonment of construction of its Salem Harbor No. 5 generating station.

We will treat these issues individually below.

Return on Common Equity and Capital Structure

The payments Narragansett makes to NEPCO are premised upon a return on common equity of 14.6 percent. As is the case with Narragansett, NEPCO calculates its requested return on the basis of the cost of common equity to NEES. Narragansett presented the direct testimony of Eugene W. Meyer, a vice president and director of the firm Kidder, Peabody and Co., and rebuttal testimony of Donald E. Rose, assistant treasurer of the NEES operating subsidiaries, to justify this return. Ralph E. Miller, of the firm J. W. Wilson and Associates, testifying on behalf of the Division, presented an analysis which showed the cost of common equity to NEES to be in the range 10.52 to 11.27 per cent. Mr. Miller also stated that, in his view, the capital structure for NEPCO inherent in the R-10 rate is inequitable, in that there is no deduction made from the common equity component for NEPCO's equity investments in the Yankee Atomic Electric Company. Since NEPCO, as well as the other owners of the Yankee company, earns a return on its investment through Yankee's sales, NEPCO's inclusion of that investment in its capital structure for its

own rate determination amounts to a double recovery on the same invested dollars. That portion of Narragansett's R-10 payments to NEPCO which reflects this double return is an unreasonable expense, Mr. Miller states, and should not be borne by Narragansett's rate payers.

Substantial cross-examination of all the witnesses offering opinions on the fair rate of return for NEPCO took place during the hearings. As is generally the case in this complicated field of study, many different theories were presented which, when filtered through the judgement of the different analysts, led to reasonably disparate results. This Commission will not, as a part of its efforts of setting the reasonable level of Narragansett's intrastate rates, make a finding as to the theoretical cost of equity to NEPCO. It is sufficient for us to note that that cost to NEPCO is found in a fashion identical to the method for determining the cost of equity to Narragansett (i.e., a study of the cost of NEES's equity). It would be unreasonable, in our view, to allow Narragansett to pass on to its rate payers its payments to NEPCO which are based on a return on equity in excess of what this Commission has found for the same company. We therefore will allow in the justifiable cost of purchased power to be borne by Narragansett's customers a return on common equity of 12.5 per cent, which was found to be Narragansett's (and NEES's) cost of equity in our last previous decision for this company in Docket No. 1172.

We will adopt Mr. Miller's capital structure of December 31, 1976, as the appropriate one in which this equity return should be incorporated. In so doing, we are adopting Mr. Miller's exclusion of NEPCO's investment in the Yankee Atomic Electric Company from its equity component of the capital structure. To do otherwise would be to burden Narragansett's customers with the payment of a double

return to NEPCO on that investment. This is inequitable. As Mr. Rose admitted, the Yankee company is presently involved in a proceeding before the F.P.C. to increase its equity return in its wholesale rates. The recipient of those increased return dollars is NEPCO, as well as Yankee's other owners. This is the proper avenue for NEPCO to earn its return on this investment, not through Narragansett and Narragansett's customers.

Based on these determinations, we find the proper overall return on which Narragansett's purchased power cost adjustment will be calculated is 9.13 per cent.

Cash Working Capital

NEPCO has calculated its cash working capital allowance by applying the so-called 45 day "rule of thumb" to essentially its total operation and maintenance expenses except purchased power. Testifying on behalf of the Division, Mr. Aarne Hartikka, of the public utilities consulting firm Hess & Lim, Inc., stated that such a calculation results in a double counting of the working capital allowance for fuel expense. His reasoning derives from the fact that NEPCO obtains all its fuel for generation from an independent company known as Pru Lease. Included in the payments by NEPCO to Pru Lease for fuel burned are carrying charges associated with the keeping of fuel inventory and with financing the lag between the burning of fuel and NEPCO's payment therefor. NEPCO pays Pru Lease for fuel burned in any month on the twentieth day of the following month. These carrying charges were $4,050,000 during the test year for NEPCO's R-10 cost of service.

Mr. Hartikka states that these carrying charges fully finance the lag between the burning of fuel and the recovery

by Pru Lease of fuel costs. NEPCO's payment of its total fuel bill on the twentieth day following the month of purchase approximately coincides with NEPCO's collection of revenues from its customer companies. Thus, Mr. Hartikka claims that NEPCO's claim for a working capital allowance for fuel expense is unfounded. Mr. Hartikka recommends that the double counting be resolved by excluding from the purchased power costs Narragansett's customers must bear the $4,050,000 Pru Lease carrying charges.

Cash working capital calculation is a sticky point in a proceeding such as this. The law is clear in this state that the rule of thumb approach cannot be used by this Commission. *Rhode Island Consumers' Council v. Smith*, 302 A. 2d 757 111 R.I. 271 (1973). On the other hand, the F.P.C. uniformly accepts use of such a rule. *Cf.*, *Union Electric Company*, 47 F.P.C. 144, 175 (1972). The issue presented here is graphic evidence of the failure of such a rule of thumb. There is no question that NEPCO's methodology results to some extent in a double recovery of the working capital needs with respect to fuel purchases. Stated another way, since Pru Lease, not NEPCO, must finance this lag, and NEPCO's payments to Pru Lease are compensatory for the lag, there is no justification for allowing NEPCO a working capital provision for these expenditures. More to the point, there is no justification for allowing Narragansett's customers to contribute to Narragansett's payment of this double compensation. We agree with Mr. Hartikka that the reasonable method of dealing with the issue here is not to alter the working capital allowance inherent in Narragansett's payments. Rather, we will decline to allow Narragansett to pass on to customers that portion of its payments to NEPCO which reflects the Pru Lease carrying charges. The bottom line result is the same: Nar-

ragansett's customers will pay only once for the cash working capital associated with fuel purchased for generation.

Salem Harbor No. 5

In January, 1972, NEPCO commenced planning of a new generating station, known as Salem Harbor unit No. 5. Construction proceeded, with concurrent engineering studies, design work, and fabrication of components, until February, 1974. All activity was halted at that time, because it had become apparent that the planned unit was no longer feasible. Total expenditures at that date approximated $13,150,000. NEPCO has included the entire loss in its rate base, to be amortized through cost of service, along with the associated tax benefits, over five years.

Mr. Hartikka proposed that such treatment was unreasonable, in that it assigned the entire burden of the loss on the customers, absolving the stockholders of any of the risk whatsoever of what turned out to be a mistake in management judgment. Mr. Hartikka proposed that the loss be eliminated from rate base, and amortized over a period of ten years rather than five. This method still results in a total recoupment by NEPCO of the loss incurred, but denies NEPCO the time value of the lost investment over the period of amortization.

The issue here is not the propriety or omniscience of NEPCO's management judgment in 1972. There was no evidence presented which could tend to show carelessness or failure of circumspection in embarking on construction of Salem Harbor No. 5. What is at issue is apportionment risk. Narragansett proposes that it (that is, its rate payers) should bear all of the risk, and all of the loss, associated with this investment. We cannot agree. Equity investors

in NEES are compensated for the risk of investment in setting the rate of return for the subsidiary companies. The cost of equity is higher than the cost of senior capital precisely because of risks, such as this, which common stockholders bear. If there were no risk of investment, there would be no equity premium. We will adopt Mr. Hartikka's method of allocating the risks in the setting of Narragansett's rates. We find that this is a reasonable apportionment of risk, not unduly burdensome on Narragansett's rate payers. Insofar as the ultimate stockholders are concerned, we note that this method still levies the lion's share of the risk, and burden of payment on the rate payers. The present value of the amortization amounts, discounted at 9.13 per cent, is approximately 64 per cent of the total loss. Thus, investors are still absorbing only 36 per cent of the loss.

Conclusion

Because of our determinations enumerated herein as to the reasonableness of Narragansett's payments to its affiliate, we will not allow Narragansett the total amount of pass-through of purchased power costs which it sought in its rates. The amount of its increased annual power expense which we will allow to be reflected in its rates is $5,387,573 over the costs at the settled R-9 rate. This yields an adjustment in Narragansett's retail rates of $.00178 (1.78 mills) per kilowatt hour.

In our decision in Docket No. 1176, we allowed Narragansett a purchased power cost adjustment of $.00113 per kilowatt hour, based on our calculation of the reasonable level of increased power costs Narragansett should be al-

lowed to collect from its customers. Subsequently, the R-9 rate was settled at a level below that which we found. The proper adjustment for Narragansett to reflect the R-9 rate as settled is 1.04 mills per kilowatt hour. We will herewith reduce the purchased power cost adjustment allowed in Docket No. 1176 to 1.04 mills; the further adjustment of 1.78 mills per kilowatt hour herein allowed is to be added to the 1.04 mills, for a total of 2.82 mills per kilowatt hour to reflect the settled R-9 rate and the reasonable additional cost of rate R-10 to be borne by Narragansett's customers.

Now, therefore, it is (9254) *ORDERED*:

(1) That the tariff filing made by The Narragansett Electric Company on December 1, 1975, which was proposed to increase Narragansett's revenues by $9,300,000 annually, is hereby denied, dismissed and rejected.

(2) Narragansett's purchased power cost adjustment No. 4, allowed to become effective on February 26, 1976, is hereby reduced to 1.04 mills per kilowatt hour.

(3) Narragansett is to place into effect, for electricity consumed on and after this date, a purchased power cost adjustment No. 5, of 1.78 mills per kilowatt hour, which will generate $5,296,426 in additional revenue on 1975 billing units.

(4) This rate increase is allowed subject to refund, pending completion of F.P.C. proceedings with respect to the R-10 rate and entry of a final order as to NEPCO's reasonable wholesale price of power sold to Narragansett. Narragansett will refund to its customers all collections herein allowed which reflect a cost of purchased power greater

than that ultimately found by the F.P.C. to be just and reasonable.

DATED AND EFFECTIVE AT PROVIDENCE, RHODE ISLAND, THIS FIRST DAY OF DECEMBER, 1976.

PUBLIC UTILITIES COMMISSION
WILLIAM W. HARSCH,
Chairman
EDWARD W. BURMAN,
Commissioner
JOHN J. WRENN,
Commissioner

Appendix C.

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Richard L. Dunham, Chairman; Don S. Smith, and James G. Watt.

New England Power Company — Docket Nos. ER76-304 and ER76-317

Order Denying Motions to Reject, Accepting Proposed Tariff Sheets for Filing, Suspending Use Thereof, Consolidating Proceedings, Providing for Hearing, Granting Interventions and Establishing Procedures

(*Issued December 31, 1975*)

On November 28, 1975, New England Power Company (NEPCO) tendered for filing proposed changes in its FPC Electric Tariff, Original Volume No. 1, in Docket No. ER76-304.[1] The proposed tariff sheets constitute a new Rate R-10 which NEPCO requests be made effective January 1, 1976. NEPCO states that the change in its present Rate R-9 to be effected by these tariff sheets will, *inter alia*, increase the demand charge from $5.72 per kilowatt of demand to $6.43 per kilowatt and will increase the energy charge from 1.75 cents per kilowatt-hour to 1.78 cents per kilowatt-hour. The charge for sub-transmission service

[1]NEPCO's proposed tariff sheets were designated Schedule II-A, Seventh Revised Page No. 1; Schedule II-A, Seventh Revised Page No. 2; Schedule II-B, First Revised Page No. 1; Schedule II-B, Original Page No. 2; and Schedule III-C, Second Revised Page No. 9.

would also be increased from 5 cents per kilowatt of demand to 46 cents per kilowatt. The proposed rates would produce approximately $28,600,000 in additional revenues from 33-full requirement customers on the basis of the 12 month test period ending December 31, 1976 (Period II). These additional revenues represent an increase of approximately 6% over the presently effective rate. In its cost-of-service study supporting the proposed increases, NEPCO claims that it is entitled to a rate of return of 9.94% which includes a return of 14.60% on common equity.

NEPCO states that the rate increase proposed in Docket No. ER76-304 is necessary to provide the increased revenues needed to meet continually increasing operating expenses and to enable the company to raise capital on reasonable terms to provide future service to the consumer. NEPCO states further that it has been unable to earn a fair return for the past two years and that as result its financial integrity has been called into question to the detriment of both shareholders and consumers.

On December 1, 1975, NEPCO tendered for filing in Docket No. ER76-317 further proposed changes in the company's FPC Electric Tariff, Original Volume No. 1.[2] The proposed tariff sheets constitute a new Rate R-10/CD for certain of NEPCO's Primary Service for Resale Customers that have opted for Contract Demand Service. NEPCO requests an effective date of January 1, 1976. The effect of the R-10/CD rate change would be to increase the annual revenues from the six customers presently receiving Contract Demand Service by approximately $764,300 based upon the calendar year 1976 as a test period. The changes

[2]These tariff sheets were designated Schedule II-CD, First Revised Page No. 1; Schedule II-CD, First Revised Page No. 2; and Schedule III-T-CD, First Revised Page No. 2.

in NEPCO's present R-9/CD rate to be effected by these tariff sheets will, *inter alia*, increase the demand charge for these customers from $6.22 per kilowatt of demand to $7.01 per kilowatt. The rate for deliveries at the sub-transmission level would be increased to 46 cents per kilowatt of demand. The energy charge would remain 1.4 cents per kilowatt-hour.

NEPCO states that the costs to be recovered by the R-10/CD rate in Docket No. ER76-317 are the costs contained in NEPCO's R-10 Period II cost of service filed in Docket No. ER76-304 which are allocable to the company's six Contract Demand customers on the basis of their R-10/CD demands. NEPCO therefore requests waiver of the requirements of Section 35.13(b)(4) (iii) of the Commission's Regulations Under The Federal Power Act, 18 CFR Section 35.13(b)(4)(iii). NEPCO also seeks a waiver of Section 35.13(b)(1) of our Regulations, 18 C.F.R. Section 35.13(b)(1), which requires that rate change filings include revenue comparison data for the twelve months preceding and following the proposed effective date of the changes. In support of its request NEPCO states that it has submitted revenue comparison data for the twelve months following the proposed effective date and that data for the twelve months preceding the proposed effective date would be exactly the same except for changes in the quantities of outside entitlements available to these customers under the NEPOOL Agreement. NEPCO claims that revenue changes which occur for this reason alone are not meaningful and that the requirement that revenue comparison data for the twelve months preceding the proposed effective date should therefore be waived.

On December 15, 1975, public notice of NEPCO's proposed tariff rate R-10 was issued with protests or interventions due on or before December 22, 1975. Notice of

proposed tariff rate R-10/CD was issued on December 12, 1975, with comments, protests or petitions to intervene due on or before December 23, 1975.

A petition to intervene in Docket No. ER76-304 was filed by the Green Mountain Power Corporation (Green Mountain) on December 22, 1975. On that same day Congressman Michael J. Harrington filed his protest and petition to intervene in Docket No. ER76-304 in which he requested us to reject NEPCO's filing, or, in the alternative, suspend the filing for five months and order hearings on the proposed increases. Also filed in Docket No. ER76-304 on December 22 was a joint protest, petition to intervene and motion to reject by various customers of NEPCO (Customers).[3] On December 23, 1975 NEPCO filed a response to these filings. Our review of each of the petitions to intervene leads us to the conclusion that it would be in the public interest to allow each of these petitioners to intervene in this proceeding.

In support of his motion to reject, Congressman Harrington alleges that NEPCO and its parent, the New England Electric System (NEES), are having the best year in their history while the region NEPCO serves is experiencing an economic recession induced in part by NEPCO's rates. While it may be true that the financial position of NEPCO and NEES has improved, and while we are not unmindful of the economic difficulties being experienced by the

[3]The members of this group include the NEPCO Customer Rate Committee; the Electrical Departments and Plants of the Massachusetts Towns and Cities of Ashburnham, Boylston, Danvers, Georgetown, Groton, Groveland, Hingham, Holden, Hudson, Hull, Ipswich, Littleton, Mansfield, Marblehead, Merrimac, Middleton, North Attleboro, Paxton, Peabody, Princeton, Shrewsbury, Sterling, Templeton, Wakefield and West Boylston; Littleton, New Hampshire; the Manchester Electric Company; and the New Hampshire Electric Cooperative, Inc.

Northeastern States, as well as by other regions of our country, we cannot at this time conclude on the basis of these allegations alone that NEPCO's proposed rate increase is completely unwarranted and must be rejected. Nor can we agree with Congressman Harrington that rejection of NEPCO's filing is required by the fact that Commission proceeding on NEPCO's previous rate increase have not yet been concluded.

Congressman Harrington has also requested us to eliminate from NEPCO's cost-of-service all "excessive" regulatory expenses and legal fees. He states that by "excessive" he means "anything above the industry average as a percentage of total operating expenses." While regulatory expenses and legal fees are, like other elements of a company's cost of service, subject to review in a rate proceeding, we are not prepared at this time to adopt, or to reject, the test proposed by Congressman Harrington to determine whether any of NEPCO's regulatory expenses or legal fees are "excessive." Resolution of this issue is more properly dealt with on an evidentiary record at the hearing herein ordered.

In this connection Congressman Harrington also requests us "to formulate an administrative rule which would permit intervenors representing retail customers to recover their reasonable expenses from the company-fees which would be awarded at the discretion of the Commission and passed on to customers as an operating expense." We decline to formulate such a rule of general application in this proceeding. Not only is our authority to order such reimbursement questionable, but the wisdom of such a course is also a matter which requires further consideration.[4] Even if we

[4] *See, e.g., Green County Planning Board* v. *F.P.C.* 455 F.2d 412, 427 (D.C. Cir. 1972).

assume that we have the power to award such fees we do not believe that Congressman Harrington has adequately alleged circumstances which would require us to award reimbursement to him for legal expenses incurred on behalf of himself and other NEPCO customers he purports to represent.[5] In this regard we note that a number of NEPCO's customers have already organized their opposition to NEPCO's proposed increase and have retained counsel to represent them. (Note 3, *supra*).

Customers have also moved us to reject NEPCO's filing in Docket No. ER76-304 for a number of reasons. Before discussing these objections we note that rejection of a filing is appropriate only in "the clear case of a filing that is either patently deficient in form or a substantive nullity." *Municipal Light Boards* v. *F.P.C.*, 450 F.2d 1341, 1346 (1971). Customers allege first that NEPCO has failed "to comply with the spirit of the [Commission's] regulations" by indicating in Statement L its actual realized return during Period I rather than the overall return which would have been realized during Period I under Rate R-9, the rate which it proposes to supersede. In its response NEPCO argues that the Period I regulation calls for an "actual unadjusted" cost of service and that hence it was proper to use the actual return figure included in its Statement L. The narrow question before us is whether NEPCO's filing should be rejected. We are not convinced that NEPCO's filing is patently deficient in form or a substantive nullity thus requiring rejection.

Similarly, in Docket No. ER76-304 Customers seek rejection of NEPCO's filing for failure to comply with Sections 35.13 (b)(4)(iii) and 35.13(b)(1) of our Regulations, 18 CFR 35.13(b)(4)(iii) and 35.13(b)(1), which require a full ex-

[5] *Grace* v. *Ludwig*, 484 F.2d 1262, 1267-1271 (2nd Cir. 1973).

planation of each estimate included in Period II and the inclusion in the filing of testimony and exhibits that would serve as NEPCO's case-in-chief. In particular customers allege that NEPCO has failed to explain or support (1) its decision to cancel its Salem Harbor No. 5 generating station, to include the unamortized portion of that unit in rate base, to amortize the cost of that unit through cost of service; and tax treatment of amounts associated with the unit; (2) the effect of its decision to join with NEES and its affiliates in filing a consolidated tax return; and (3) its inclusion as a cost item in its Period II cost of service of increased book depreciation rates. To buttress their allegations, Customers refer us to a filing by NEES in Securities and Exchange Commission Docket No. 57-561 wherein NEES purportedly states that projections such as the Period II projections at issue here were not necessarily prepared with reasonable care by qualified personnel under the supervision of management. NEPCO responds by arguing that the prepared testimony, exhibits and work papers of its witnesses adequately explain the company's Period II estimates and are in compliance with the cited Regulations. NEPCO further challenges Customers' interpretation of the NEES comments filed with SEC. Again, we must reiterate that the question before us is a narrow one: is NEPCO's filing patently deficient in form or a substantive nullity thereby requiring rejection. We cannot conclude that rejection is required. That is not to say that NEPCO's filing is adequate to support the proposed increased rates. We take no position at this time on the adequacy of the testimony, exhibits and work papers to support the proposed rates. We find only that the filing should not be rejected. In reaching this decision we have carefully considered Customers arguments that NEPCO's alleged failure to comply with the Commission's regulations has in the past imposed considerable burdens upon intervenors and the Commission's

Staff. We have concluded that NEPCO has in this case filed adequate Period II testimony, exhibits and work papers to avoid rejection.

Several other grounds are given by Customers for rejecting NEPCO's filing. We are told that the proposed increase in the sub-transmission charge is discriminatory and not cost supported. Similarly, we are told that the demand and energy metering loss adjustment is also discriminatory and not cost justified. Customers view these changes as nothing more than an attempt to revive the discriminatory practices condemned by the Commission in *Shrewsbury Municipal Light Dept.* v. *New England Power Company*, 32 FPC 370 (1964), *aff'd sub nom. New England Power Co.* v. *F.P.C.*, 349 F.2d 258 (1st Cir. 1965). NEPCO responds by pointing to the fact that the increase in the sub-transmission charge is applicable to all customers receiving sub-transmission service. NEPCO also cites testimony of one of its witnesses and the data contained in one of its exhibits. We conclude that there are issues of fact here which require resolution in an evidentiary hearing. Rejection of NEPCO's filing would be premature and unwarranted.

Nor can we reject NEPCO's filing simply because Customers have alleged that the proposed rate of return is "grossly excessive." The appropriateness, or inappropriateness of NEPCO's rate of return is a factual question which requires development in an evidentiary hearing. Rejection of NEPCO's filing would preclude such opportunity to consider the propriety of the proposed return.

Similarly, we will deny Customer's motion to reject as unjustified on its face NEPCO's reduction of the credit applicable to those customers who by their own investment have provided the facilities necessary to receive high tension (69 or 115 Kv) service from NEPCO. In attacking NEPCO's filing, Customers have again challenged the testi-

mony of NEPCO's witnesses and the exhibits prepared by them. By doing so, Customers have only emphasized the need for an evidentiary hearing to determine whether NEPCO's position has been adequately supported.

Finally, Customers have requested summary judgment on three issues. First, Customers allege that NEPCO cannot be permitted to include its Salem Unit No. 5 in rate base or to amortize the costs associated with Salem No. 5 through charges to cost of service. In a related argument, Customers challenge NEPCO's tax treatment of amounts connected with Salem No. 5. We conclude that summary judgment would be wholly inappropriate with respect to these issues. Summary judgment is reserved for those situations in which there are no issues as to material facts. In the instant case there remain numerous disputed issues of fact which must be resolved before it can be determined whether the rate base, cost of service and tax treatment accorded by NEPCO to amounts associated with Salem No. 5 are proper.

The second issue which Customers seek to have decided in their favor by means of summary judgment is whether NEPCO should be allowed to justify its rates through the use of normalized income taxes. To support their motion Customers point to their presentation in NEPCO proceedings in Docket Nos. E-8641, *et al.*, involving Rate R-8 which was in effect during an earlier period. Again, we must deny summary judgment. The question of whether a company may use normalized income taxes in computing its cost of service must perforce be answered on a case by case basis on an evidentiary record.

Finally, Customers move for summary judgment on the issue of whether NEPCO should be allowed to include construction work in progress (CWIP) in rate base as an alternative justification for the proposed rates. Specifically,

Customers request that testimony and exhibits which support the inclusion of CWIP be stricken. As support for their request Customers refer to our orders of August 5, 1975 and October 3, 1975 in *New England Power Company*, Docket Nos. E-9136, *et al.*, *appealed sub nom. New England Power Company* v. *F.P.C.*, (1st Cir. No. 75-1379). In those orders we summarily dismissed portions of a proposed rate increase which reflected the inclusion of CWIP in rate base. Customers also argue that evaluation of the CWIP issue is more properly the subject of our rulemaking proceeding in Docket No. RM75-13. NEPCO responds by asserting that the proposed rate is not based upon CWIP and that the evidence offered by NEPCO's witnesses is an alternative justification for inclusion of CWIP which is offered in the event that the Commission in Docket RM75-13 permits the inclusion of CWIP prior to decision in the instant case. While we are sympathetic with the position taken by Customers, we have concluded that it is not necessary to rule on this question at this time. The inclusion of CWIP is an alternative basis for the proposed rates. In the instant case, unlike Docket Nos. E-9136, *et al.*, the alternative basis for the rates was submitted with the original filing. Thus, were we to grant Customers motion for summary judgment there would be no effect on NEPCO's proposed rates. We therefore decline to rule on the question at this time and will deny the Customers' motion. Our denial of the motion is, however, without prejudice to Customers' reviewing their motion to strike before the Administrative Law Judge at a later date.

Our review of NEPCO's proposed tariff changes in Docket Nos. ER76-304 and ER76-317 leads us to conclude that they should be accepted for filing. NEPCO states that the material required for its filing in Docket No. ER76-317 is contained in the filing in ER76-304. We shall therefore

grant the requested waiver of Section 35.13(b)(4)(iii) and of Section 35.13(b)(1) of our Regulations. Such waiver is granted solely for the purpose of allowing the proposed tariff changes to be filed with the Commission to become effective after the two month suspension hereinafter ordered. The grant of such waiver should not be construed as a finding by the Commission that the data filed in either docket is sufficient to justify the changes proposed in Docket No. ER76-317.

In view of close relationship that appears to exist between the two dockets, we will also consolidate these dockets for purposes of the hearing hereinafter ordered and for all other purposes.

While we will accept NEPCO's proposed tariff changes for filing, we note that several issues may require development in an evidentiary hearing. Moreover, the proposed increases in rates have not been shown to be just and reasonable and may be unjust, unreasonable or otherwise unlawful. We shall therefore suspend the proposed increases in both dockets for two months and shall direct that a hearing be held on the justness and reasonableness of the rates proposed therein.

Our decision to suspend the proposed increases for a period of two months is, as in all cases in which we must fix the period of suspension, an attempt to balance sharply conflicting interests. On the one hand stand the consumers who have vigorously asserted a variety of challenges to the proposed rates and who argue that the filing should be rejected in its entirety. Barring that, the consumers argue that nothing short of a five month suspension period would be appropriate. On the other hand stands the company which asserts that a suspension period for longer than one day will cause extreme financial hardship and will effectively preclude the company from earning a fair return. We

conclude that under the circumstances the interests of the parties will best be balanced by a two month suspension period.

Evidence relevant to the issues raised by the instant filing should be submitted by all parties including the Commission Staff. Without limiting their right to present such further evidence as they deem relevant and material, the parties and our Staff should present evidence which considers, in addition to the issues raised by the intervenors, *supra*, the following: (1) reduction of rate base by the amount of accumulated provision for deferred federal income taxes (Account 283); and (2) the use of a rate of return on common equity of 14.60%.

The Commission further finds:

(1) Good cause has not been shown for rejecting NEPCO's filing in Docket No. ER76-304.

(2) Good cause has been shown in Docket No. ER76-317 for waiving Sections 35.13(b)(1) and 35.13(b)(4)(iii) of the Commission's Regulations Under the Federal Power Act, 18 CFR Section 35.13(b)(1) and 18 CFR Section 35.13(b)(4)(iii), respectively.

(3) It is necessary and proper in the public interest and to aid in the enforcement of the Federal Power Act that the Commission enter upon a hearing concerning the lawfulness of NEPCO's rate increases filed in Docket Nos. ER76-304 and ER76-317, and that such increase be accepted for filing, suspended and the use thereof deferred as hereinafter ordered.

(4) It is necessary and proper in the public interest and to aid in the enforcement of the Federal Power Act that the Commission consolidate Docket Nos. ER76-304 and ER76-317 for hearing and for all other purposes.

(5) Good cause has not been shown for awarding reimbursement to Congressman Harrington for legal fees.

(6) Good cause exists to permit the intervention in Docket No. ER76-304 of Green Mountain, Congressman Harrington and Customers.

The Commission orders:

(A) The motion to reject filed by Congressman Harrington and Customers are hereby denied.

(B) The requirements of Section 35.13(b)(1) and 35.13(b)(4)(iii) of the Commission's Regulations Under the Federal Power Act, 18 CFR Section 35.13(b)(1) and 18 CFR Section 35.13(b)(4)(iii), are hereby waived, in Docket No. ER76-317 for the reasons and to the extent set forth above.

(C) Pending a hearing and decision thereon, NEPCO's November 28, 1975 filing in Docket No. ER76-304 and its December 1, 1975 filing in Docket No. ER76-317 are accepted for filing and suspended for two months until March 1, 1976, when they will be permitted to become effective, subject to refund.

(D) Docket Nos. ER76-304 and ER76-317 are hereby consolidated for hearing and for all other purposes.

(E) A Presiding Administrative Law Judge to be designated by the Chief Administrative Law Judge for that purpose (See Delegation of Authority, 18 CFR 3.5(d)), shall preside at an initial conference in this proceeding on January 23, 1976 at 9:30 A.M., EST, in a hearing room of the Federal Power Commission, 825 North Capitol Street, N.E., Washington, D. C. 20426. Said Presiding Administrative Law Judge is hereby authorized to establish all procedural dates for this proceeding and to rule upon all motions (except petitions to intervene, motion for consolidation and severance, and motions to dismiss, as provided for in the Rules of Practice and Procedure).

(F) The request by Congressman Harrington for an award of attorney's fees is hereby denied.

(G) Green Mountain, Congressman Harrington and Customers are hereby permitted to intervene in Docket No. ER76-304, subject to the Rules and Regulations of the Commission: *Provided, however*, that the participation of these parties shall be limited to matters affecting the rights and interests specifically set forth in their petitions to intervene, and *Provided, further* that the admission of these parties as intervenors shall not be construed as recognition that they might be aggrieved because of any order or orders issued by the Commission in this proceeding.

(H) Nothing contained herein shall be construed as limiting the rights of parties to this proceeding regarding the convening of conferences or offers of settlement pursuant to Section 1.18 of the Commission's Rules of Practice and Procedure.

(I) The Secretary shall cause prompt publication of this order to be made in the Federal Register.

By the Commission.

(S E A L)

KENNETH F. PLUMB,
Secretary.

Appendix D.

FEDERAL POWER ACT, 16 U.S.C. § 824.

Declaration of policy; application of subchapter; definitions

(a) It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this subchapter and subchapter III of this chapter and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(c) For the purpose of this subchapter, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) The term "sale of electric energy at wholesale" when used in this subchapter, means a sale of electric energy to any person for resale.

(e) The term "public utility" when used in this subchapter and subchapter III of this chapter means any person who owns or operates facilities subject to the jurisdiction of the Commission under this subchapter.

(f) No provision in this subchapter shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

June 10, 1920, c. 285, § 201, as added Aug. 26, 1935, c. 687, Title II, § 213, 49 Stat. 847.

16 U.S.C. § 824d.

Rates and charges; schedules; suspension of new rates

(a) All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission,

(1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public

utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

June 10, 1920, c. 285, § 205, as added Aug. 26, 1935, c. 687, Title II, § 213, 49 Stat. 851.

GENERAL LAWS OF RHODE ISLAND.

39-3-24. *Transactions between utilities for which approval required.* — With the consent and approval of the division, but not otherwise:

(a) Any two (2) or more public utilities doing business in the same municipality or locality within this state, or any two (2) or more public utilities whose lines intersect or parallel each other within this state, or furnish a like service or product within this state, may enter into contracts with each other that will enable such public utilities to operate their lines or plants in connection with each other.

(b) Any public utility may purchase or lease all or any part of the property, assets, plant and business of any other public utility, and in connection therewith may exercise and enjoy all of the rights, powers, easements, privileges and franchises theretofore exercised and enjoyed by such other public utility with respect to the property, assets, plant and business so purchased or leased.

(c) Any public utility may sell or lease all or any part of its property, assets, plant and business to any other public utility, provided that a sale or lease of all or substantially all of its property, assets, plant and business shall be authorized by a vote of at least two-thirds (⅔) in interest of its stockholders at a meeting duly called for the purpose. Any stockholder who shall not have voted in favor of such sale or lease, either in person or by proxy, shall be entitled to the rights and the corporation shall be subject to the duties, obligations and liabilities set forth in §§ 7-5-8 to 7-5-16, inclusive, with respect to dissenting stockholders and to

corporations which sell, lease or exchange their entire assets respectively.

(d) Any such public utility may purchase the stock of any other such public utility.

39-3-25. *Proceedings for approval of transactions between utilities.* — The proceedings for obtaining the consent and approval of the division for such authority shall be as follows:

There shall be filed with the division a petition, joint or otherwise, as the case may be, signed and verified by the president and secretary of the respective companies, clearly setting forth the object and purposes desired, stating whether or not it is for the purchase, sale, lease, or making of contracts or for any other purpose in § 39-3-24 provided and also the terms and conditions of the same. The division shall upon the filing of such petition, if it deem the same necessary, fix a time and place for the hearing thereof. If, after such hearing, or, in case no hearing is required, the division is satisfied that the prayer of such petition should be granted, that the facilities for furnishing service to the public will not thereby be diminished and that the purchase, sale or lease and the terms thereof are consistent with the public interest, it shall make such order in the premises as it may deem proper and the circumstances may require.

39-3-26. *Charters amended to authorize approved transactions.* — The charters of all corporations subject to the regulation by the division of public utilities are hereby amended to the extent necessary to authorize the carrying out of any agreement, purchase, sale or lease approved by the division as provided in §§ 39-3-24 and 39-3-25.

39-3-27. *Transactions with affiliates — Definition of terms.* — "Affiliate" shall mean and include the following:

1. Every person owning or holding, directly or indirectly, ten per cent (10%) or more of the voting capital stock of a public utility.

2. Any corporation, voluntary association or trust, ten per cent (10%) or more of the voting capital stock of which is owned or controlled directly or indirectly by a person owning or controlling directly or indirectly ten per cent (10%) or more of the voting capital stock of a public utility.

3. Any person with whom a public utility has a management or service contract or arrangement of the character set forth in § 39-3-28, including contracts for personal services with persons not otherwise affiliated.

"Person" shall mean and include individuals, corporations, trustees, lessees, holders of beneficial equitable title, voluntary associations, receivers and partnerships.

39-3-28. *Agreements with affiliates required to be filed.* — The original or a verified copy of any contract or arrangement and of any modification thereof or a verified summary of any unwritten contract or arrangement, the consideration of which exceeds five hundred dollars ($500), hereafter entered into between a public utility and an affiliate providing for the furnishing of managerial, supervisory, construction, engineering, accounting, purchasing, financial or any other services, either to or by a public utility or an affiliate, shall be filed by the public utility with the division within ten (10) days after the date on which the contract is executed or the arrangement entered into. The division may also require a public utility to file in such form as the division may require full information with respect to any purchase from or sale to an affiliate, whether or not made in pursuance of a continuing contract or arrangement.

39-3-29. *Unfiled agreements with affiliates.* — Any contract or arrangement not filed with the division pursuant to § 39-3-28 shall be unenforceable in any court in this state and payments thereunder may be disallowed by the division, unless the later filing thereof is approved in writing by the division.

39-3-30. *Investigation and order as to transaction between affiliates.* — The division shall have full power and authority to investigate any such contract, arrangement, purchase or sale, and if the division, after notice and hearing, shall find such contract, arrangement, purchase or sale to be unjust or unreasonable, the division may make such reasonable order relating thereto as the public good requires. In any such investigation the burden shall be on the public utility or affiliate to prove the reasonableness of any such contract, arrangement, purchase or sale with, from or to an affiliate. If the public utility shall fail to satisfy the division of the reasonableness of any such contract, arrangement, purchase or sale, the division may disapprove the same, or disallow payments thereunder or such part of any such payment as the division shall find to be unjust or unreasonable, or both disapprove and disallow as aforesaid. No payment disallowed by the division shall be capitalized or included as an operating cost of the public utility in the fixing of rates or as an asset in fixing a rate base. If, in any such investigation, the public utility or affiliate shall unreasonably refuse to comply with any request of the division for information with respect to relevant accounts and records, whether of such public utility or any affiliate, any portion of which may be applicable to any transaction under investigation, so that such parts thereof as the division may deem material may be made part of the record, such refusal shall justify the

division in disapproving the transaction under investigation and disallowing payments in pursuance thereof.

39-3-32. *Disallowance of payments to affiliates in rate proceedings.* — In any proceeding, whether upon the division's own motion or upon complaint, involving the rates or practices of any public utility, the division may disallow the inclusion in the accounts of a public utility of any payments or compensation to an affiliate for any services rendered, or property furnished, under existing contracts or arrangements with an affiliate unless such public utility shall establish the reasonableness of such payment or compensation.

Supreme Court, U. S.
FILED
MAR 22 1978
MICHAEL RODAK, JR., CLERK

No. 77-1295

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

EDWARD F. BURKE,
Petitioner

v.

THE NARRAGANSETT ELECTRIC COMPANY

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF RHODE ISLAND

BRIEF IN OPPOSITION

SAMUEL HUNTINGTON,
CAROL K. DIETZ,
20 Turnpike Road,
Westborough, Massachusetts 01581
Attorneys for Respondent

PRESS OF GEORGE H. DEAN CO., BOSTON

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OPINIONS BELOW

The opinion of the Rhode Island Supreme Court (Pet. App. 1a-12a) is reported at 381 A.2d 1358. The decision and order of the Rhode Island Public Utilities Commission (Pet. App. 13a-33a) is reported at 17 P.U.R. 4th 164.

JURISDICTION

The judgment of the Supreme Court of Rhode Island was entered on December 30, 1977. The petition for a writ of certiorari was filed on March 16, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

STATUTES INVOLVED

Sections 201 and 205 of the Federal Power Act, 16 U.S.C. §§ 824, 824d, and Sections 39-3-30 and 39-3-32 of the Rhode Island General Laws are set forth at Pet. App. 48a-52a and 55a-56a. Section 206(a) of the Federal Power Act, 16 U.S.C. § 824e(a), provides:

> "Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order."

Section 308(a), 16 U.S.C. 825g(a), provides:

> "Hearings under this chapter may be held before the Commission, any member or members thereof or any representative of the Commission designated by it, and appropriate records thereof shall be kept. In any proceedings before it, the Commission, in accordance with such rules and regulations as it may prescribe, may admit as a party any interested State, State commission, municipality, or any representative of interested consumers or security holders, or any competitor of a party to such proceeding, or any other person whose participation in the proceeding may be in the public interest."

QUESTION PRESENTED

Whether, in a retail rate proceeding limited to the question of an electric utility's cost of purchasing power from its interstate wholesale affiliate, a state public utilities commission has jurisdiction to inquire into the reasonableness

of the costs of the affiliate underlying the wholesale electric rates when the affiliate and its wholesale rates are subject to the plenary authority of the Federal Energy Regulatory Commission[1] under the Federal Power Act, 16 U.S.C. §§ 824, *et seq.*

STATEMENT

This case involves an investigation by the Rhode Island Public Utilities Commission (the "PUC") of the reasonableness of the costs underlying the wholesale electric rate charged respondent, The Narragansett Electric Company ("Narragansett"), by its affiliate New England Power Company ("New England Power"). The proceeding before the PUC was limited to the question whether Narragansett should be permitted to adjust its retail rates to reflect increased purchased power costs under a wholesale rate filed by New England Power and allowed to become effective subject to refund by the Federal Power Commission (now the Federal Energy Regulatory Commission, see note 1, *supra*) pending a full investigation under Section 205(e) of the Federal Power Act, 16 U.S.C. § 824d(e).

Despite the pending full investigation by the Federal Power Commission, the PUC heard extensive evidence and made specific findings on the reasonableness of New England Power's costs underlying its wholesale rates — the very issue before the Federal Power Commission. As a result, Narragansett was only permitted to adjust its retail rates to recover a portion of its increased purchased power

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[1] The functions of the Federal Power Commission under the Federal Power Act were recently transferred to the Federal Energy Regulatory Commission within the newly created Department of Energy. Department of Energy Organization Act, P.L. 95-91, § 402, 42 U.S.C. § 7172. The substantive provisions of the Federal Power Act were not amended by the transfer.

costs (Pet. App. 32a). On appeal, the Rhode Island Supreme Court reversed, holding that "jurisdiction to determine the reasonableness of the wholesale rate charged by [New England Power] to Narragansett rests exclusively with the FPC" under the Federal Power Act, 16 U.S.C. §§ 824 *et seq.* (Pet. App. 6a).

A. *Background*

Both Narragansett and New England Power are subsidiaries of New England Electric System ("NEES"), a registered holding company under the Public Utility Holding Company Act of 1935, 15 U.S.C. §§ 79, *et seq.* NEES and its electric operating companies form an "integrated public-utility system" (the "NEES System"),[2] with New England Power providing the generation and transmission for the distribution subsidiaries — Narragansett,[3] Massachusetts Electric Company and Granite State Electric Company. The distribution companies serve retail customers in Rhode Island, Massachusetts and New Hampshire, respectively. Narragansett purchases nearly all its power requirements from New England Power.

The NEES System structure parallels the jurisdictional division between the Federal Energy Regulatory Commission and the state regulatory commissions: the rates at which New England Power sells power at wholesale to the

[2] The Securities and Exchange Commission has ruled that the electric utility subsidiaries of NEES constitute an "integrated public utility system" within the meaning of the Public Utility Holding Company Act. *Re New England Electric System*, 38 S.E.C. 193, 199-200 (1958). See *Securities and Exchange Commission* v. *New England Electric System*, 384 U.S. 176, 177-78 (1966).

[3] Narragansett owns certain limited generation and transmission facilities which are controlled by New England Power under an integrated facilities contract.

distribution subsidiaries are regulated by the Federal Energy Regulatory Commission under the Federal Power Act, 16 U.S.C. §§ 824 *et seq.*, whereas the retail rates of the three distribution subsidiaries are regulated by the respective state regulatory commissions. Thus, increased generation and transmission costs cannot be recovered from the System's ultimate customers until both the Federal Energy Regulatory Commission permits increased wholesale rates to go into effect and the state regulatory commissions permit the distribution companies to recover their resulting increased purchased power costs through increased retail rates. It is a matter of critical importance to the financial stability of the System that the pass through of increased purchased power costs not be subjected to undue regulatory lag.

In order to expedite the reflection of increased wholesale rates in its retail rates, Narragansett sought and obtained approval from the PUC in 1972 of a purchased power cost adjustment clause as part of its retail rate tariffs. This clause, which is still in effect, provides that Narragansett's rates are subject to adjustment for changes in Narragansett's wholesale cost of purchased power as reflected by New England Power's wholesale rates "as from time to time on file and effective with the Federal Power Commission".

B. *Proceedings Before the PUC*

In November 1975, New England Power filed a new wholesale rate ("Rate R-10") with the Federal Power Commission to take effect January 1, 1976, to reflect increased costs in providing wholesale electric service. The Commission accepted the rate for filing, suspended its effectiveness for two months until March 1, 1976, at which time the rate would take effect subject to refund, and initiated a full

investigation and hearings on the justness and reasonableness of the proposed rate (Pet. App. 34a-47a). On March 1, 1976, Rate R-10 became effective and New England Power began charging Narragansett at the increased rate for electric power purchased at wholesale by Narragansett.

On December 1, 1975, Narragansett filed with the PUC a notice of adjustment of its retail rates pursuant to the purchased power cost adjustment clause to reflect its increased costs of purchased power under Rate R-10. The adjustment was to be subject to refund in the event Rate R-10 were subsequently reduced. The PUC suspended the effective date of the proposed adjustment pending an investigation. At a hearing before the PUC in March 1976, Narragansett presented testimony on the amount of the increase in its purchased power costs under Rate R-10 and the need for an adjustment to its retail rates and rested its case.

No further hearings were held until August 16, 1976, by which time the PUC had announced its intention to investigate New England Power's costs underlying Rate R-10. At the August 16 hearing, Narragansett moved that the purchased power cost adjustment to its retail rates be put into effect immediately. The PUC denied the motion and ruled that "it has clear jurisdiction and authority as well as the obligation under Rhode Island statutes to investigate the costs which relate to and which underly [sic] the proposed purchased power cost adjustment" (Tr., Aug. 17, 1976, p. 3).

While fully reserving its right to challenge in subsequent judicial proceedings the Commission's jurisdiction, Narragansett presented the testimony and exhibits of certain witnesses prepared in connection with New England Power's Rate R-10 case before the Federal Power Commission and made the witnesses available for cross-examination. In addition, the Rhode Island Division of Public Utilities and

Carriers presented witnesses on New England Power's cost of capital and certain cost of service issues. The PUC thus considered the very same testimony and issues concerning New England Power's costs that were the subject of the Federal Power Commission's investigation of Rate R-10.[4]

Finally, on December 1, 1976, the PUC issued its final decision and order. It specifically rejected Narragansett's claim that the PUC was barred from investigating the costs underlying New England Power's Rate R-10 by the Federal Power Act. Based on its evaluation of the reasonableness of specific costs underlying New England Power's Rate R-10, the PUC determined that Narragansett was entitled to recover only approximately $5,300,000 of the $9,300,000 annual increased purchased power expense incurred by Narragansett under Rate R-10. Narragansett was ordered to place into effect a purchased power cost adjustment reflecting the lower amount (Pet. App. 13a-33a).

The record before the PUC firmly establishes the devastating impact on Narragansett of its inability to recover through its retail rates the full amount of its payments to New England Power for purchased power. From March 1, 1976, when Rate R-10 became effective, through December 1, 1976, when the PUC issued its decision, Narragansett was forced to absorb an estimated $7,054,000 of increased purchased power expense, or on average more than $780,000 per month. In large part due to this inability to recover a legitimate expense, it was estimated that Narragansett would incur a loss on its intrastate operations regulated by the PUC of $900,000 for the 12 months ending November 30,

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[4] Extensive hearings were concluded in New England Power's R-10 case in March 1977 and an Initial Decision was issued by the Administrative Law Judge in June 1977. All parties excepted to portions of the Initial Decision, and the case is now awaiting final decision by the full Federal Energy Regulatory Commission.

1976.[5] Narragansett continues to be unable to recover a very significant portion of its increased purchased power expense.

C. *The Decision Below*

On appeal, the Rhode Island Supreme Court reversed and remanded, holding unanimously that the PUC lacks jurisdiction to inquire into the reasonableness of the wholesale rate charged to Narragansett by New England Power since Congress had delegated exclusive regulatory authority over such rate to the Federal Power Commission under the Federal Power Act (Pet. App. 5a-6a).

The court emphasized that it was not interferring with the PUC's basic authority over retail rates; the PUC need not permit an increase in Narragansett's retail rates to reflect the increased purchased power cost if Narragansett has experienced savings in other areas of its operations (Pet. App. 9a). Nor did the court deny the PUC's authority under § 39-3-30 of the Rhode Island General Laws to investigate transactions among affiliates; it simply ruled that Narragansett had met its burden of proof with respect to its purchases from New England Power by establishing that such purchases were at the rate filed with and permitted to take effect by the Federal Power Commission — the only legal rate New England Power could charge. The court agreed with a decision of the Mississippi Supreme Court reaching the same conclusion in a case presenting precisely the same issue. *United Gas Corp.* v. *Mississippi Public Service Commission,* 240 Miss. 405, 442-43; 127 So. 2d 404, 420 (1961) (Pet. App. 7a-8a).

[5] The record includes an affidavit submitted by Narragansett to the Rhode Island Supreme Court in May 1977 showing that Narragansett sustained a loss of $1,295,000 on its intrastate operations for the calendar year 1976, and that the loss continued to grow through February 1977.

ARGUMENT

The decision below is correct and, contrary to petitioner's assertion (Pet. 8-17), presents no conflict with prior decisions of this Court. The court below correctly perceived that the Federal Power Act vests the Federal Energy Regulatory Commission (successor to the Federal Power Commission) with exclusive authority over wholesale electric rates and their underlying costs, while preserving the basic authority of state commissions over retail rates. Petitioner's argument that state commissions should be free to duplicate the investigatory and adjudicatory functions of the Federal Energy Regulatory Commission by inquiring into the reasonableness of costs underlying wholesale rates is based upon a superficial and faulty reading of the Federal Power Act and its legislative history. Since the decision below is correct and is consistent with the decision of the only other court to consider the issue in the 43 years since the enactment of the Federal Power Act, *United Gas Corp.* v. *Mississippi Public Service Commission,* 240 Miss. 405, 442-43; 127 So. 2d 404, 420 (1961), there is no occasion for plenary review by this Court.

1. In 1935, Congress enacted Part II of the Federal Power Act, 16 U.S.C. §§ 824 *et. seq.,* to bring interstate wholesale sales of electricity under effective federal regulation. Under Sections 205 and 206 of the Act, Congress vested in the Federal Power Commission pervasive authority to investigate and adjudicate the reasonableness of interstate wholesale rates. Carefully balancing consumer and investor interests, Congress in Section 205(e) provided

for the suspension of new wholesale rate filings for up to five months pending investigation by the Commission; if the investigation is not completed at the end of the suspension period, the filed rates become effective subject to the Commission's power to order refunds at the conclusion of its investigation.

Fundamental to the above statutory scheme is the principle that no wholesale rate may be charged by an electric utility other than the rate on file with the Commission and in effect. As this Court has observed with respect to the Federal Power Act (*Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 251 (1951):

> "[A wholesale customer] can claim no rate as a legal right that is other than the filed rate, *whether fixed or merely accepted by the Commission,* and not even a court can authorize commerce in the commodity on other terms" (emphasis added).

New England Power's wholesale sales to Narragansett are in interstate commerce and thus are subject to the plenary rate authority of the Federal Energy Regulatory Commission. Once Rate R-10 was accepted for filing and permitted to take effect by the Commission, it was the only legal rate New England Power could charge Narragansett. Neither a court nor a state regulatory commission has authority to establish a different rate.

In addition to lacking jurisdiction to challenge the wholesale Rate R-10 directly, the PUC has no jurisdiction to examine the reasonableness of New England Power's costs underlying Rate R-10 in reviewing Narragansett's retail rates. The Federal Power Act not only gives the Federal Energy Regulatory Commission exclusive jurisdiction over Rate R-10 itself, but as a logical corollary also establishes the Commission as the sole arbiter of the reasonableness of

New England Power's underlying costs. If petitioner's argument in this case were sustained, the PUC would have authority to investigate precisely the same issues — cost issues going to the reasonableness of New England Power's wholesale electric rates — entrusted to the Federal Energy Regulatory Commission. Such duplicative regulation would be totally inconsistent with the statutory scheme embodied in the Federal Power Act.

In enacting the Federal Power Act, Congress did not overlook the interests of state commissions in assuring that utilities subject to their jurisdictions pay only reasonable rates for power purchased at wholesale. Section 308(a) of the Act expressly provides for the intervention of states, state commissions and consumer representatives in wholesale rate hearings before the Federal Energy Regulatory Commission. Both petitioner and the Rhode Island Consumers' Council intervened and fully participated in New England Power's Rate R-10 case, currently awaiting final decision by the full Federal Energy Regulatory Commission.

2. Petitioner asserts that the decision below is in direct conflict with prior decisions of this Court. Primary reliance is placed on this Court's pre-Federal Power Act decision in *Western Distributing Co.* v. *Public Service Commission,* 285 U.S. 119 (1932), holding that a state commission is not constitutionally barred in retail rate proceedings from examining the costs underlying the wholesale rates of affiliates. Citing highly selective statements in the legislative history of the Federal Power Act, petitioner then argues that Congress in enacting the Federal Power Act divided state and federal regulatory authority along precise constitutional lines in strict accord with all of this Court's prior rulings. It is petitioner's argument, rather than the decision below, which is in direct conflict with decisions of this Court.

The Federal Power Act was in large measure passed in response to a series of this Court's decisions, culminating in *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927), holding that state regulatory commissions are barred by the Commerce Clause of the United States Constitution from regulating wholesale sales of electric energy in interstate commerce.[6] In enacting the Federal Power Act, Congress filled the "Attleboro gap" by bringing wholesale sales of electricity under comprehensive, effective regulation. As this Court has noted, Congress did not limit federal jurisdiction to those matters beyond the constitutional power of the states to regulate, but instead undertook "to draw a bright line easily ascertained, between state and federal jurisdiction, making unnecessary [a] case-by-case analysis." *Federal Power Commission* v. *Southern California Edison Co.*, 376 U.S. 205, 215-16 (1964).

The "bright line" drawn by Congress left intact the basic authority of the states over retail rates; the states, not the federal government, are to fix local rates. S. Rep. No. 621, 74th Cong., 1st Sess. 48 (1935). Congress' preservation of basic state authority over retail rates, however, did not include preservation of the very limited state authority recognized in *Western Distributing* to inquire into costs underlying interstate wholesale transactions between affiliates not otherwise subject to competition or regulation. A determination of the reasonableness of such costs is an integral part of an adjudication of wholesale, not retail, rates. By granting the Federal Power Commission plenary authority over interstate wholesale electric rates, Congress brought wholesale transactions among affiliates under effective federal control and thereby completely removed the basis for state scrutiny of those matters.

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[6] For a comprehensive analysis of the legislative history of the Federal Power Act, see *Federal Power Commission* v. *Southern California Edison Co.*, 376 U.S. 205, 212-16 (1964).

3. An examination of the entire regulatory scheme enacted in 1935 confirms Congress' intent to subject wholesale electric transactions among affiliates to exclusive federal regulation. Part II of the Federal Power Act was enacted together with the Public Utility Holding Company Act of 1935, 15 U.S.C. §§ 79 *et seq.*, as a single, coordinated piece of legislation to bring both interstate sales of electric energy at wholesale and electric utility holding companies under effective regulation. Public Utility Act, Pub. L. No. 74-333; 49 Stat. 803 (1935). The Holding Company Act expressly sanctions the continued existence of holding companies, recognizing the economies of management and integration of related facilities made possible by properly restricted holding companies. Congress was also deeply concerned with the potential for self-dealing within holding company systems, however, and provided in Section 13 of the Act for the regulation of transactions between affiliates by the Securities and Exchange Commission. Expressly excluded from the coverage of Section 13, however, are wholesale sales of electric energy between affiliates. Section 2(a)(20). Since such wholesale sales were simultaneously subjected to plenary rate regulation by the Federal Power Commission under Sections 205 and 206 of the Federal Power Act, the inference is compelling that Congress intended that Commission to be the exclusive arbiter of the reasonableness of interstate wholesale transactions between different electric subsidiaries of the same holding company.

The legislative history of the 1935 federal legislation confirms the above conclusion. Congress focused sharply on the absence of arms' length bargaining in transactions between members of the same holding company system and the practical inability of the states to regulate such transactions. *E.g.*, S. Rep. No. 621, *supra*, pp. 36, 56. State authority over such transactions under the *Western Distributing* decision, *supra*, was referred to as "purely theo-

retical" in view of the difficulty facing a state agency attempting to determine the costs of affiliates located in two or more states. Hearings on H.R. 5423 before House Committee on Interstate and Foreign Commerce, 74th Cong., 1st Sess. 761 (1935). In enacting the Federal Power Act, Congress explicitly recognized the relationship between the control of holding companies and the regulation of the interstate electric power business (S. Rep. No. 621, *supra*, pp. 17-18); accordingly, it undertook not only to fill the "Attleboro gap", but also to bring one aspect of intercompany dealing — wholesale sales of electricity — under effective federal regulatory control.[7]

4. The decision below avoids duplicative administrative proceedings which would force utilities to justify the same costs before two different regulatory agencies and would greatly increase regulatory lag. While Congress sought in 1935 to fill the gaps in regulation, it did not create a system envisioning simultaneous regulation by federal and state agencies of costs underlying wholesale transactions; federal regulation alone of these costs was deemed sufficient effectively to protect consumers' interests.[8] In subjecting

[7] While petitioner relies on statements in the committee reports to the effect that Congress did not intend to usurp state regulatory authority, petitioner fails to cite the Senate Commerce Committee's statement emphasizing that the purpose of the Federal Power Act was to impose federal regulation over those matters "which cannot *effectively* be controlled by the States" (emphasis added). S. Rep. No. 621, *supra*, p. 18.

[8] As this Court has noted with respect to legislation containing parallel rate provisions (*Panhandle Eastern Pipe Line Co.* v. *Public Service Commission*, 332, U.S. 507, 520 (1947)):

> "The Natural Gas Act created an articulate legislative program based on a clear recognition of the respective responsibilities of the federal and state regulatory agencies. It does not contemplate ineffective regulation at either level."

wholesale rates and their underlying costs to comprehensive federal regulation, Congress preempted the states from regulating the same transactions. See *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 236 (1947). As this Court recently ruled, where a "federal scheme . . . aims precisely at the same ends as does" a state regulation, the state regulation must fall. *Ray* v. *Atlantic Richfield Co.*, 46 U.S. Law Week, 4200, 4203 (U.S. 1978).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

SAMUEL HUNTINGTON,
CAROL K. DIETZ,
20 Turnpike Road,
Westborough, Massachusetts 01581
Attorneys for Respondent

March, 1978

Supreme Court, U. S.
FILED
APR 3 1978
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1977

No. 77-1295

EDWARD F. BURKE,

Petitioner,

v.

THE NARRAGANSETT ELECTRIC COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF RHODE ISLAND

BRIEF AMICUS CURIAE IN SUPPORT OF PETITION

KATHLEEN HERZOG LARKIN
Chief Counsel

JOHN ANTONUK
Assistant Counsel

P.O. Box 3265
Harrisburg, Pennsylvania 17120
Attorneys for Pennsylvania Public Utility Commission

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PREFACE

This brief in support of the issuance of the writ of certiorari requested by Petitioner is filed with the consent of the parties to this proceeding, written consent having been received from Petitioner's Counsel on March 22, 1978 and from counsel for Respondent on March 29, 1978.

Alternatively it is asserted that the Pennsylvania Public Utility Commission, which is an independent regulatory commission created by the Pennsylvania General Assembly for the purpose of regulating the rates and service of public utilities within Pennsylvania and having its own legal officer, is authorized to file this brief under the provisions of Supreme Court Rule 42(4).

INTEREST OF THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

The Pennsylvania Public Utility Commission (Pa. P.U.C.) is charged by the provisions of the Act of May 28, 1937, P.L. 1053, 66 P.S. §1101 *et seq.*, with the regulation of the rates for service charged by electricity distribution utilities operating within the Commonwealth of Pennsylvania. In the exercise of this responsibility the Pa. P.U.C. scrutinizes the operating expenses of these jurisdictional utilities. The purpose of such scrutiny is to determine whether these expenses are reasonable, and therefore includable in the rates of those companies. This Act contains provisions similar to Sections 39-3-28, 39-3-30, and 39-3-32 of the Rhode Island General Laws. Act of May 28, 1937, P.L. 1053, §701.1 (replacing §701 of the same act which section was repealed by the Act of October 7, 1976, P.L. 1057). Both Sections require filing of contracts or arrangements between affiliated utilities with the Pa. P.U.C., provide for investigation thereof by the Pa. P.U.C., and further require that the Pa. P.U.C. disallow for ratemaking purposes such payments made under these contracts or arrangements as are unjust and unreasonable.

A significant portion of the operating expenses of Pa. P.U.C. jurisdictional utilities is represented by electric power either purchased by distribution companies from electricity generating companies or received by distribution companies from generating companies from the interchange network which connects the transmission systems of Pennsylvania distribution utilities with each other and with companies outside the state.

The rates for these contract purchases and interchange receipts are set by the Federal Energy Regulatory Commission (FERC) under the Federal Power Act, 16 U.S.C. §§824 *et seq.* If petitioner in this proceeding prevails on the merits the consequences for the Pa. P.U.C. will be of major

significance. In that event the scope of the Pa. P.U.C.'s regulatory effort will be greatly expanded, inasmuch as the amount of wholesale energy received by electricity distribution utilities in Pennsylvania is very large. For example, in calendar year 1976, approximately twenty-four billion kilowatt hours of electricity were received from generating companies by distribution companies whose rates for retail service are regulated by the Pa. P.U.C. This total represents approximately 30 percent of the total 1976 retail sales by electricity distribution utilities in Pennsylvania. More than three hundred and fifty million dollars was paid by those distribution companies on account of such contract purchases or interchange receipts. Of these amounts more than 25% accrued from contracts or interchanges between associated entities. Forms filed with the FERC and the Pa. P.U.C. disclose for the 1976 period that eleven contract arrangements and thirteen interchange agreements existed between such associated entities.*

A ruling by the United States Supreme Court on the merits in this proceeding would establish firmly a major boundary between federal and state regulation of electricity rates. The amounts at issue in drawing such a boundary are of major impact to the retail electricity consumers of Pennsylvania. A decision on the merits favorable to petitioner would confirm the authority of state utility regulatory commissions, such as the Pa. P.U.C., to examine the

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*All statistical information contained in this paragraph is taken from Annual Reports required by law to be filed with the Pa. P.U.C. Act of May 28, 1937, P.L. 1053, §906, 66 P.S. §1346. These reports are similar to those filed with the FERC. A copy of such a report's purchased and interchange power sections is attached hereto as "Annex A." Cost for received interchange power was calculated from these forms as follows:

$$\text{Cost of Received Interchange Power} = \frac{\text{Column i total}}{\text{Column h total}} \times \text{Column f total}$$

reasonableness of a substantial portion of the operating expenses of electricity distribution utilities whose rates are regulated by them.

ARGUMENT

Petitioner in this matter adequately defines the issues brought before this Court. That definition will not be repeated here.

The Pa. P.U.C. hereby seeks only to establish the importance of that issue within the Commonwealth of Pennsylvania so as to support petitioner's assertion that this issue is of major national significance. The preceding statement of the interest of the Pa. P.U.C. in this proceeding serves to show such significance. As noted, wholesale exchanges of electricity where the recipient is a distribution company whose rates are subject to Pa. P.U.C. jurisdiction amounted to approximately twenty-four billion kilowatt hours and three hundred and fifty million dollars in 1976, the last full year for which reports have, as of this date, been filed.

There is no reason to expect that these figures will be lower for succeeding years. Sales and exchanges of electricity are becoming an increasingly integral element of the process of electricity generation and distribution. Disparities in prices of generating fuels, accelerating cost increases in plant construction costs, and fuel availability are among the factors which create wide divergences in the per kilowatt hour cost of generation from plant to plant. In recognition of these disparities greater sophistication is being steadily achieved in the process of minimizing generation costs by means of lowest cost generation programs which manage generation on a multi-company basis.

The Pennsylvania-New Jersey-Maryland interconnection (PJM) illustrates this sophistication. Member companies

from four separate states are part of a computer system which determines the most cost efficient generation for the then current demand caused by the member companies' customer loads. Because the optimum generation mix changes with the demand, the amount each member company's generation feeds the demand of other members (as well as the amount each company receives from the generation of other members) is constantly changing. For the appropriate accounting periods each company's net import and export amounts are calculated and appropriate money settlements made.

Thus it is observed that these interchanges and settlements are a daily factor in the process of maintaining retail electricity service adequately and economically.

The interchange ability is of major importance in meeting emergency needs as well. The lengthy miners' strike recently concluded threatened serious service cutbacks for companies bound primarily to coal fired generation. The availability of purchased and interchange power from companies employing oil and nuclear fired generation was a major factor in the ability of the recipient companies to extend the life of coal stockpiles. Understandably the entire pattern of wholesale power exchanges was altered by the forced reduction in coal fired generation of electricity. Such drastic alterations materially affect the costs of providing services subject to the jurisdiction of the Pa. P.U.C.

The importance of wholesale electricity exchanges to the Pa. P.U.C., and presumably to other such state commissions, is then clearly illustrated in the showing that such exchanges are an integral part of the retail distribution of electricity, which distribution is in Pennsylvania under the statutory authority of the Pa. P.U.C. And the exercise of that jurisdiction would be substantially affected by answer to the question whether state utility regulatory commissions

may investigate the reasonableness of the millions of dollars charged for the billions of kilowatt hours sold under FERC tariffs and recovered for under state commission tariffs governing retail electricity rates.

The national significance of a decision on the merits of this proceeding is manifest.

CONCLUSION

Wherefore, the Pennsylvania Public Utility Commission requests that the United States Supreme Court issue a writ of certiorari to review the judgment of the Supreme Court of Rhode Island, entered in these proceedings on the 30th day of December, 1977.

Submitted by:

KATHLEEN HERZOG LARKIN
Chief Counsel

JOHN ANTONUK
Assistant Counsel

P.O. Box 3265
Harrisburg, Pennsylvania 17120

Attorneys for Pennsylvania
Public Utility Commission

ANNEX A

Annual report of Pennsylvania Power Company Year ended December 31, 1976

PURCHASED POWER (Account 555)
(Except interchange power)

1. Report power purchased for resale during the year. Exclude from this schedule and report on page 424 particulars concerning interchange power transactions during the year.
2. Provide subheadings and classify purchases as to (1) Associated Utilities, (2) Nonassociated Utilities, (3) Associated Nonutilities, (4) Other Nonutilities, (5) Municipalities, (6) Cooperatives, and (7) Other Public Authorities. For each purchase designate statistical classification in column (b), thus: firm power, FP; dump or surplus power, DP; other, O, and place an "x" in column (c) if purchase involves import across a state line.
3. Report separately firm, dump, and other power purchased from the same company. Describe the nature of any purchases classified as Other Power, column (b).

Line No.	Purchased From (a)	Statistical Classification (b)	Import across State Lines (c)	F.P.C. Rate Schedule No. of Seller (d)	Point of Receipt (e)	Substation (f)	Kw or Kva of Demand (Specify which): Contract demand (g)	Average monthly maximum demand (h)	Annual maximum demand (i)
1	ASSOCIATED UTILITIES								
2	NONE								
3	NON-ASSOCIATED UTILITIES								
4	OHIO VALLEY ELECTRIC CORP. a/c AEC(1)	FP	X	-	VARIOUS (2)		-	-	-
5									
6									
7									
8									
9									
10	(1) PURCHASE OF SURPLUS POWER IS PURSUANT TO ARTICLE 6 OF INTER-COMPANY								
11	POWER AGREEMENT AMONG OVEC AND SPONSORING COMPANIES DATED JULY 10, 1953								
12	BY MODIFICATION NO. 1 DATED JUNE 3, 1966, MODIFICATION NO. 2 DATED								
13	JANUARY 7, 1967 AND MODIFICATION NO. 3 DATED NOVEMBER 15, 1967.								
14	(2) RESPONDENT OPERATES IN A CLOSED LOOP WITH OTHER UTILITIES, AND THE ENERGY								
15	TRANSFERRED IS NOT CLASSIFIED INDIVIDUALLY AT THE VARIOUS TRANSFER								
16	POINTS.								
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PURCHASED POWER (Account 555) (Continued)
(Except Interchange power)

4. If receipt of power is at a substation indicate ownership in column (f), thus: respondent owned or leased, RS; seller owned or leased, SS.
5. If a fixed number of kilowatts of maximum demand is specified in the power contract as a basis of billing, this number should be shown in column (g). The number of kilowatts of maximum demand to be shown in columns (h) and (i) should be actual based on monthly readings and should be furnished whether or not used in the determination of demand charges. Show in column (j) type of demand reading (instantaneous, 15, 30, or 60 minutes integrated).
6. The number of kilowatt hours purchased should be the quantities shown by the power bills.
7. Explain any amounts entered in column (o) such as fuel or other adjustments.

Line No.	Name of company (a)	Statistical Classification (b)	Rate Schedule Number (c)	Point of delivery (d)	Voltage at which delivered (e)	KILOWATT-HOURS Purchased (f)	KILOWATT-HOURS Interchange-out (g)	KILOWATT-HOURS Net Interchange (h)	KILOWATT-HOURS Total (i)	Cost per kwh (j)
1	Ohio Edison Co.	OS	9A.11A	Pa.-Ohio State Line	23,000	425,711,600	282,968,000	142,743,600	142,743,600	0.97
2	Economy Power				69,000	277,838,406	19,786,000	258,052,406	258,052,406	
3	Other				138,000	10,261,000	-	10,261,000	10,261,000	
4	CAPCO-Bruce Mansfield #1				345,000	2,983,000	-	2,983,000	2,983,000	
5	CAPCO-Beaver Valley #1									
6	Total-Associated Utilities					716,794,006	302,754,000	414,040,006	414,040,006	
7										
8	Non-Associated Utilities									
9	Duquesne Light Co.		21	N. Sewickley Twp.-Beaver Co., Pa.	69,000	-	1,441,000	(1,441,000)	(1,441,000)	
10	West Penn Power		20	Connoquenessing Twp.-Butler Co., Pa. and Pine Twp., Mercer Co., Pa.	138,000	205,000	-	205,000	205,000	
11					69,000					
12	Toledo Edison Co.	X		See Note (1)	345,000	-	4,105,000	(4,105,000)	(4,105,000)	
13	CAPCO Replacement Energy	X		See Note (1)	345,000	12,371,000	5,201,000	7,170,000	7,170,000	
14	Interchange Power Net					729,370,006	313,501,000	415,869,006	415,869,006	
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42										
43										
44										
45										

Type of demand reading (i)	Voltage at which received (k)	Kilowatt-hours (l)	Demand Charges ($) (m)	Energy Charges ($) (n)	Other Charges ($) (o)	Total ($) (p)	Cost per kwh (q)
-	-	57,739,000	-	-	568,494	568,494	0.97
		$1,732,000	-	-	568,494	568,494	0.97

INTERCHANGE POWER (Included in Account 555)

1. Report below all of the kilowatt-hours received and delivered during the year. For receipts and deliveries under interchange power agreements, show the net charge or credit resulting therefrom.
2. Provide subheadings and classify interchanges as to (1) Associated Utilities, (2) Nonassociated Utilities, (3) Associated Nonutilities, (4) Other Nonutilities, (5) Municipalities, (6) Cooperatives, and (7) Other Public Authorities. For each interchange across a state line place an "X" in column (b).
3. Particulars of settlements for interchange power shall be furnished in a footnote or supplemental schedule which includes the name of each company, the nature of the transaction, and the dollar amounts involved. If settlement for any transaction also includes credit or debit amounts other than for increment generation expenses, show such other component amounts separately, in addition to debit or credit for increment generation expenses, and give a brief explanation of the factors and principles under which such other component amounts were determined. If such settlement represents the net of debits and credits under an interconnection, power pooling, coordination, or other such arrangement, submit a copy of the annual summary of transactions and billings among the parties to the agreement. If the amount of settlement reported in this schedule for any transaction does not represent all of the charges and credits covered by the agreement, furnish in a footnote a description of the other debits and credits and state the amounts and accounts in which such other amounts are included for the year.

Summary of Interchange According to Companies and Points of Interchange

Line No.	Name of company (a)	Interchanges across State lines (b)	FPC Rate Schedule Number (c)	Point of Interchange (d)	Voltage at which interchanged (e)	KILOWATT-HOURS Received (f)	KILOWATT-HOURS Delivered (g)	KILOWATT-HOURS Net difference (h)	Amount of settlement (i)
1	Associated Utilities								
2	Ohio Edison Co.	X	9A.11A	Pa.-Ohio State Line	23,000				
3	Economy Power				69,000	425,711,600	282,968,000	142,743,600	1,413,241
4	Other				138,000	277,838,406	19,786,000	258,052,406	5,389,987
5	CAPCO-Bruce Mansfield #1				345,000	10,261,000	-	10,261,000	266,558
6	CAPCO-Beaver Valley #1					2,983,000	-	2,983,000	160,049
7	Total-Associated Utilities					716,794,006	302,754,000	414,040,006	7,229,835
8									
9	Non-Associated Utilities								
10	Duquesne Light Co.		21	N. Sewickley Twp.-Beaver Co., Pa.	69,000	-	1,441,000	(1,441,000)	(13,831)
11	West Penn Power		20	Connoquenessing Twp.-Butler Co., Pa. and Pine Twp., Mercer Co., Pa.	138,000	205,000	-	205,000	3,587
12					69,000				
13	Toledo Edison Co.	X		See Note (1)	345,000	-	4,105,000	(4,105,000)	(51,042)
14	CAPCO Replacement Energy	X		See Note (1)	345,000	12,371,000	5,201,000	7,170,000	301,140
15	Interchange Power Net					729,370,006	313,501,000	415,869,006	7,469,689
16									
17									
18									
19									
20									
21	(1) Respondent operates in a closed loop with other utilities and the energy transferred is not classified individually at the various transfer points.								
22									
23									